TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914

No. 301

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

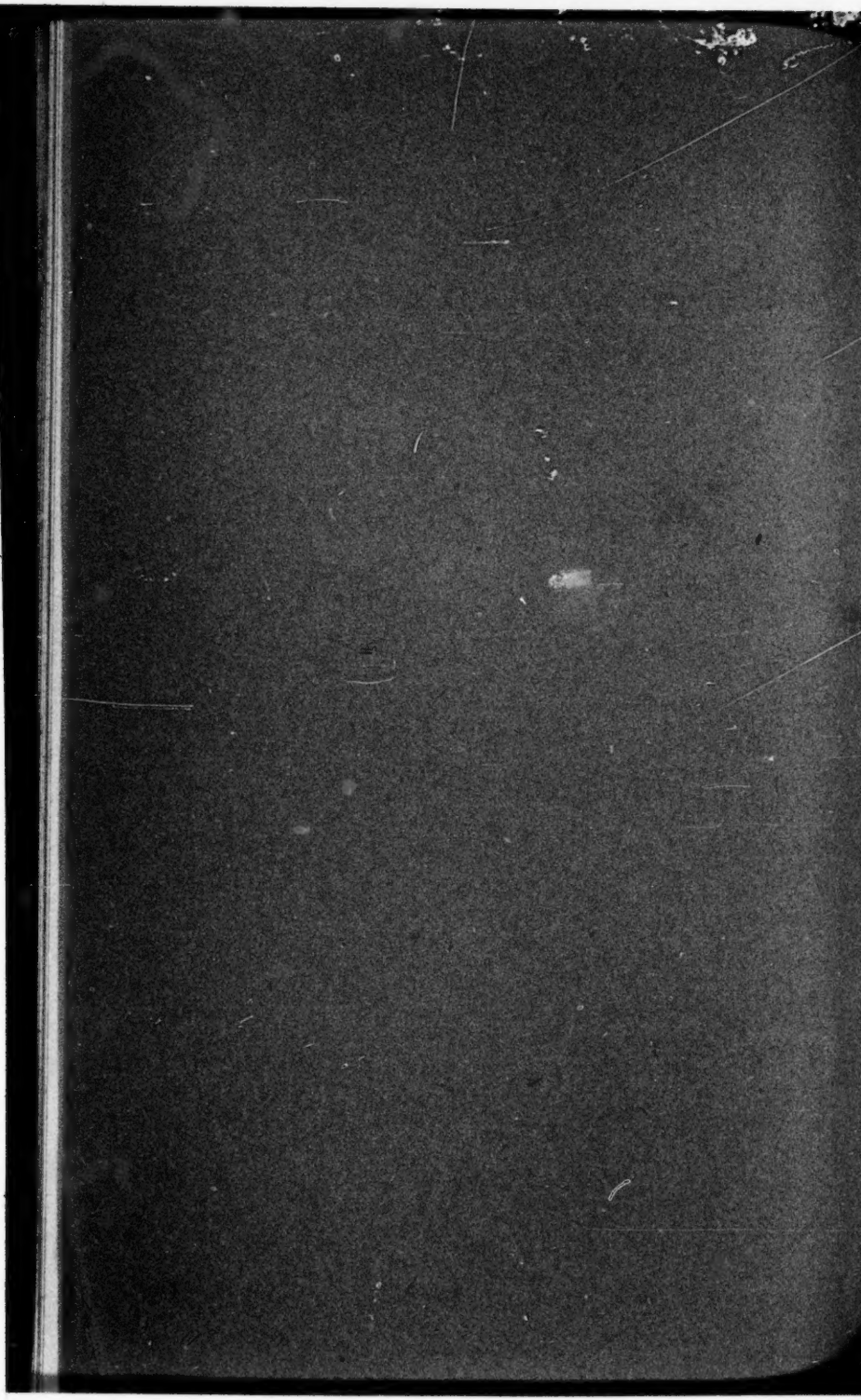
vs.

WILLIAM BOWER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

FILED DECEMBER 17, 1914.

(24,470)



(24,470)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 726.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM BOWER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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1

BOWER
v.
CHICAGO & N. W. RY. CO.

No. 17574.

Pleas Before the Supreme Court of the State of Nebraska, at a Term Thereof Begun and Holden at the Capitol, in the City of Lincoln, in said State on the 21st Day of September, 1914.

Present:

Hon. Manoah B. Reese, Chief Justice.
Hon. John B. Barnes, Judge.
Hon. Charles B. Letton, Judge.
Hon. Jacob Fawcett, Judge.
Hon. William B. Rose, Judge.
Hon. Samuel H. Sedgwick, Judge.
Hon. Francis G. Hamer, Judge.

Attest:
H. C. LINDSAY, *Clerk.*

Be it remembered, That on the 1st day of May 1912, there was filed in the office of the clerk of said supreme court a certain Transcript, in the words and figures following to-wit:

2 In the District Court of Holt County, Nebraska.

WILLIAM BOWER, Plaintiff,
vs.
CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Defendant.

STATE OF NEBRASKA,
County of Holt, ss:

Transcript of Pleadings Filed and Proceedings had in the Above-entitled Cause in the District Court of Holt County, Nebraska.

Hon. W. H. Westover, Judge.

And afterwards to wit on the 7th day of October 1911, there was filed a "Petition" in words and figures as follows:

In the District Court of Holt County, Nebraska.

WILLIAM BOWER, Plaintiff,
vs.
CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Defendant.

Petition.

1. The plaintiff for cause of action alleges that the defendant is a railroad corporation and has been the same for several years last

past, and that throughout the years 1910 and 1911, the defendant has owned and operated a line of railroad in the village of Long Pine, in Brown County, Nebraska, and thence westward to Chadron, in Dawes County, Nebraska, and that it still owns and operates said railroad. That the Village of Long Pine, in Brown
3 County, Nebraska, throughout the years 1910 and 1911, has been a division point on the defendant's said railroad.

2. That on the 28th day of November, 1910, the plaintiff was employed by the defendant for a certain reward agreed upon by the plaintiff and defendant, and was employed by the defendant as a locomotive engineer, and in the night-time of said day, and at the hour of 11.05 Mountain time, he was upon an engine then owned by defendant and in its possession in said village of Long Pine, and that he was then employed by the defendant as an engineer and was then and there employed and engaged in the business of using and operating said engine for said defendant. That said engine, at the time the plaintiff received the injuries hereinafter mentioned, was standing upon a track owned by the defendant in said village of Long Pine and that the plaintiff was upon said engine filling the lubricator of said engine, and had just completed fil-ing the said lubricator when he received the injuries hereinafter mentioned. That said engine was steamed up and was to be attached to a train of the defendant to be used in hauling said train right after the time of the happening of the injuries hereinafter mentioned, and that the said engine was brought out of the round house at Long Pine, owned by defendant, and plaintiff filled said lubricator and was steaming up said engine to have it haul the said train. That the said train was one which left Council Bluffs, in the state of Iowa, on said day and said train was being transported from Council Bluffs, Iowa, through the state of Nebraska and to the town of Deadwood, in South Dakota, and that the said train was engaged in interstate commerce and was engaged in transporting passengers, baggage, express matter and mail through the states of Iowa, Illinois, and other states, and through Nebraska and into South Dakota and Wyoming, and said train was engaged, during all of this trip, in interstate commerce and in commerce between the several
4 states of the Union, and that the plaintiff, at the time he received all the injuries hereinafter mentioned, and during all the time he was upon and working on said engine, was an employee of the defendant engaged in such interstate commerce and engaged in aiding and assisting, as such employe, in transporting persons, mail baggage and express from Illinois, Iowa and other states through Nebraska and into South Dakota and Wyoming. That the said train likewise transported persons, property, baggage and mail exclusively within the state of Nebraska and, at the same time and as such employe, this plaintiff was engaged as a railway employe of the defendant operating its engine and aiding and assisting the defendant in the transportation of persons, and property as a common carrier within the state of Nebraska, and during all of said time, the defendant was engaged as a common carrier for hire within the state

of Nebraska, and also from, through and to different states of the United States.

3. That in the night-time as aforesaid on said 28th day of November, 1910, he filled the lubricator of said engine with oil and that he did the same in the due course of his employment by the defendant and in the proper discharge of his duty towards the defendant as locomotive engineer and in the proper use of said engine, and that the work so done was necessary for him to do. That at said time the defendant owned and kept on said engine a lubricator made partly of metal and partly of glass, and that said lubricator was surrounded by a shield made of metal and which clamped around the glass of the lubricator with a spring. That at said time and for some time prior thereto the defendant had carelessly and negligently maintained said glass shield and spring in a weak, unsafe, negligent, careless and dangerous condition. That the said engine was one which carried 190 lbs. of steam and was one of more modern make, and that the said lubricator, spring and shield were made and constructed for use on engines which carried only from 140
5 to, at most, 160 lbs. of steam, and said lubricators were not of sufficient strength and size for use upon the said engine or any other engine carrying 190 lbs. of steam, and were weak, unsafe, dangerous and liable to break and explode at any time on locomotive engines. That said lubricator was not strong enough for use upon said engine, and that the defendant carelessly and negligently kept, used and maintained upon said engine the glass in said lubricator which was too weak for use on said engine, and that by reason of its being too weak for use on said engine the glass in said lubricator, spring and shield all endangered the lives, limbs, bodies and eyes of all persons who worked upon said engine, and that defendant thus maintained upon said engine the glass within aforesaid lubriator in a careless, negligent, weak and unsafe condition, and that glass in said lubricator, and the spring and shield upon said engine was dangerous and was a careless and negligent act of the defendant. That the plaintiff on said 28th day of November, 1910, exercised his duties upon said engine in a proper, prudent and careful manner, and without fault or negligence upon his part. That he carefully and properly filled the lubricator of said engine with oil and immediately after he filled it, owing to the weak, unsafe and careless and negligent condition of said glass in lubricator, the glass of said lubricator exploded and broke and loosened the spring still further and blew off the said shield, and the said shield by being so blown off struck the plaintiff in the left eye and cut, crushed, injured and bruised said eye and totally destroyed the use of the same, and that by reason of the injuries it became necessary to take said eye out entirely and it was taken out entirely as hereinafter mentioned, and thereby the plaintiff has entirely lost the use of his said left eye. That at the time of said explosion and for a long time prior thereto, the defendant had maintained the said lubricator and the glass therein and said spring and shield in
6 a weak, unsafe, careless, negligent and dangerous condition, and in such condition that said lubricator was liable to break

and explode at any time and do injury to any person working upon an engine. That said lubricator, and the glass therein were necessary appliances in the operation and use of said engine and of all other locomotive engines, but all of said lubricators and the glass therein should be so constructed as to stand the steam pressure upon the glass in said lubricators as upon the boiler of the engine, but that the defendant carelessly and negligently maintained the glass in this lubricator so that it would stand only a pressure of 160 lbs., at most, whereas the engine itself would stand a pressure of 190 lbs., and said glass was weak, unsafe and dangerous and liable to explode at any time and by reason of this difference in the pressure which would be stood by the boiler of the engine and the lubricator glass, the said glass and lubricator were liable to break and explode at any time and thus endanger the lives and limbs and eyes and bodies of any persons who were employed upon said engine.

That by reason of plaintiff's being so struck in said explosion by the aforesaid shield composed of metal, his eye was cut, crushed and bruised, ruined and destroyed, and he was then taken from Long Pine to the City of Omaha where his eye was sewed up and he remained in the Clarkson Hospital for ten days at the end of which time it was necessary to remove said eye and it was removed and he entirely lost the same, and that he remained in said hospital altogether twenty-two days. That by reason of said injuries the plaintiff has entirely lost said eye and the use thereof, and has endured and suffered sleeplessness, anguish, pain and suffering and ever will endure anguish, pain and suffering, and that by reason of said injuries his nervous system sustained a great shock and his nervous system has been permanently impaired and his health undermined, and he has sustained loss of health and all of said injuries
7 are permanent. That plaintiff, at the time he received said injuries and for a long time prior thereto, was earning $157 per month and his wages had just been raised by the defendant to $175 per month. That by reason of the loss of his time along since sustaining said injuries, he has sustained damages in the sum of $1,750, and no part thereof has been paid. That the plaintiff has been unable to perform any work or labor since sustaining said injuries, and by reason of his loss of time alone and his inability to earn money since sustaining said injuries, he has sustained damages in the sum of $1,750. That by reason of said injuries, the plaintiff has sustained damages in the sum of $31,750. That plaintiff has sustained damages in the premises in the sum of $31,750 and all of said sum is now justly due to him from the defendant, and no part thereof has been paid. That plaintiff sustained all of said injuries without fault or negligence on his part.

Whereof, Plaintiff prays judgment against the defendant for the sum of Thirty-One Thousand Seven Hundred Fifty Dollars and costs of suit.

M. F. HARRINGTON,
Attorney for Plaintiff.

THE STATE OF NEBRASKA,
Holt County, ss:

I, M. F. Harrington, do solemnly swear that I am the duly authorized attorney in the above entitled action for the plaintiff, William Bower; that said William Bower is a non-resident of Holt County and is now absent therefrom and, for that reason, does not make this verification; that I have read the foregoing petition and that the facts therein stated are true as I believe.

M. F. HARRINGTON.

Subscribed in my presence and sworn to before me this 6th day of October, A. D. 1911.

[SEAL.] ARTHUR J. HAMMOND,
Notary Public.

My commission expires November 16th 1916.

8 And afterwards to wit on the 14th day of December 1911 there was filed an Answer in words and figures as follows:

In the District Court of Holt County, Nebraska.

WILLIAM BOWER, Plaintiff,
v.
CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

Answer.

Comes now the Chicago & North Western Railway Company, defendant in the above entitled action, and for its answer to the petition of the plaintiff heretofore filed herein, admits that the defendant is now and was at all of the times stated in plaintiff's petition a railroad corporation and the owner of and operating a line of railroad in the village of Long Pine Brown County Nebraska and thence westward to Chadron in Dawes County Nebraska, and that said village of Long Pine is now and has been at all of said times a division point on defendant's said railroad; admits that on the 28th day of November, 1910, the plaintiff was in the employ of the defendant as a locomotive engineer and in the night time of said day was injured in his left eye by the br-aking of a lubricator upon the engine upon which he was employed.

2. And the defendant denies each and every allegation in said petition contained not hereinbefore specifically admitted to be true.

3. Further answering to said petition defendant alleges that the injuries which plaintiff received arose from and were due to dangers and risks which were open and obvious and known to plaintiff and were assumed by him.

4. Further answering to said petition defendant alleges that the

injuries received by plaintiff were occasioned by and due to
9 his negligence and want of care.

Wherefore defendant prays that it may go hence without day and recover its costs herein expended.

CHICAGO & NORTHWESTERN
RAILWAY CO.,
By B. H. DUNHAM,
R. R. DICKSON, &
HERMAN AYE,
Its Attorneys.

STATE OF NEBRASKA,
County of Douglas, ss:

I, B. H. Dunham, do solemnly swear that I am one of the duly authorized attorneys for the Chicago & North Western Railway Company, defendant in the above entitled action; that said defendant is a corporation for which reason I make this verification; that I have read the above and foregoing answer and know the contents thereof and that the statements and allegations therein contained are true as I verily believe.

B. H. DUNHAM.

Subscribed in my presence and sworn to before me this 12th day of December, A. D. 1911.

[SEAL.]

W. DRESSLER,
Notary Public.

10 And afterwards to wit on the 19th day of December 1911 there was filed a Reply in words and figures as follows:

In the District Court of Holt County, Nebraska.

WILLIAM BOWER, Plaintiff,
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

Reply.

Now comes the plaintiff and for reply to the answer of the defendant denies each and every allegation contained in the third and fourth paragraphs of the defendant's answer.

M. F. HARRINGTON,
Attorney for Plaintiff.

THE STATE OF NEBRASKA,
Holt County, ss:

William Bower, being first duly sworn, says that he is the plaintiff in the above entitled action. That he knows the contents of the foregoing reply and the facts therein stated are true as he verily believes.

WILLIAM BOWER.

Subscribed in my presence and sworn to before me this 18th day of December, 1911.

[SEAL.] ARTHUR J. HAMMOND,
Notary Public.

My commission expires November 16th 1916.

11 Filed Dec. 20th, 1911.

In the District Court of Holt County, Nebraska.

WILLIAM BOWER, Plaintiff,
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

Instruction No. 1 *Requested by Defendant.*

You are instructed that, under the pleadings and evidence in this case, plaintiff is not entitled to recover, and your verdict will be for the defendant.

Refused.

Def't excepts.

W. H. WESTOVER, *Judge.*

Filed Dec. 20, 1911.

In the District Court of Holt County, Nebraska.

WILLIAM BOWER, Plaintiff,
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

Instructions Requested by Plaintiff.

(1)

The jury are instructed that by the Act of Congress, approved April 22, 1908, Railroad Companies engaged in commerce between the several states are made "liable in damages to any person suffering injury while he is employed by such carrier in such commerce" for any "injury or death resulting in whole or in part, from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its neglect, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." The jury are instructed that the plaintiff herein is one of the persons who is protected by
12 this Legislation.

Given.

W. H. WESTOVER, *Judge.*

Def't excepts.

W. H. WESTOVER, *Judge.*

(2)

The same Act of Congress herein referred to also provides as follows: "That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be dimi-ished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Given.

W. H. WESTOVER, *Judge.*

Def't excepts.

W. H. WESTOVER, *Judge.*

(3)

The rule of law is that employees assume only the ordinary risks of the employment. Where the employer has furnished safe appliances and machinery, then the employee is held to assume the ordinary risks of injury from such appliances and machinery. But the employee is not held to assume the result of any injury sustained by reason of the negligence of the employer
13 in furnishing and maintaining of safe appliances or machinery. So, in this case, if the jury shall find that the glass in the lubricator in question was a safe appliance furnished by the defendant Company, and if, not withstanding the exercise of proper care by the Company in furnishing a safe glass in the lubricator, these injuries happened to the plaintiff, he cannot recover. But, on the other hand, if the jury shall be convinced by preponderance of the evidence that the glass which broke in the lubricator was unsafe and dangerous and was too weak to withstand the pressure which the defendant might know it would have to withstand and it was liable to explode at any time, and if the jury shall find that the defendant negligently failed to furnish a safe glass in the lubricator, and that it carelessly and negligently placed upon said engine a glass in the lubricator which was insufficient and dangerous and was liable to explode, and that as a result of this negligence of the defendant the plaintiff was injured, without fault or negligence on his part, then the plaintiff will not be held to have assumed the risk of such injuries. Whether the defendant failed to furnish a safe appliance in the way of glass in the lubricator and whether it was guilty of neglect, and whether the plaintiff was guilty of neglect are questions for the jury; and it is also for the jury to determine whether the injuries sustained were the result of the ordinary risks of the employment, or whether

they were due to the neglect of the defendant, as herein defined.
Def't excepts.

W. H. WESTOVER, *Judge.*

Given.
W. H. WESTOVER, *Judge.*

14 (4)

If you find for the plaintiff you will allow him as damages such sum as will compensate him for the injuries he has sustained, not exceeding $31,750, which is the amount sued for. The elements entering into damages are as follows: (1) The value of his time during the period that he was disabled by the injuries. (2) If the injuries have impaired Mr. Bower's power to earn money in the future, such sum as will compensate him for such loss of power. (3) Such reasonable sum as the jury shall award him on account of any pain and angush he has suffered by reason of his injuries. (4) Such prospective suffering and los of health, if any, as the jury may believe from all the evidence before them in this case, he will sustain by reason of such injuries. (5) Such sum as the jury may deem proper for the inconvenience of his going through life with only one eye.
Given.

W. H. WESTOVER, *Judge.*

Def't excepts.
W. H. WESTOVER, *Judge.*

Filed Dec. 20, 1911.

In the District Court of Holt County, Nebraska.

WILLIAM BOWER, Plaintiff,
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

Instruction No. 4.

You are instructed that the mere fact that the lubricator in question in this case broke and other lubricators of the same kind occasionally or even frequently broke would not of itself be
15 sufficient evidenc*t* of the negligence alleged in plaintiff's petition.
Given.

W. H. WESTOVER, *Judge.*

Pl'f excepts.
W. H. WESTOVER, *Judge.*

Filed Dec. 20, 1911.

In the District Court of Holt County, Nebraska.

WILLIAM BOWER, Plaintiff,
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

Instruction No. 5.

You are instructed that if you find from the evidence that the plaintiff in this case prior to his injury had the same knowledge as to the danger, if any, of the lubricator glass bursting, that the defendant had, and plaintiff continued in the employ of the defendant company and in the use of said lubricator glass, he assumed the risk of injury from the bursting of said glass and cannot recover in this action and your verdict must be for the defendant.

Given.

W. H. WESTOVER, *Judge.*

Pl'f excepts.

W. H. WESTOVER, *Judge.*

16 Filed Dec. 20, 1911.

In the District Court of Holt County, Nebraska.

WILLIAM BOWER, Plaintiff,
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

Instructions Given the Jury by the Court on its Own Motion.

Instruction No. 1.

The jury are instructed, that in this case the plaintiff sues the defendant and alleges that on the 28th day of November, 1910, the plaintiff was employed by the defendant as locomotive engineer on the defendant's railroad. That at said time the defendant was a common carrier operating a railroad through the states of Iowa and Nebraska and into Wyoming and South Dakota. That on said date the plaintiff, in the discharge of his duty at Long Pine, Nebraska, was injured by the explosion — the glass in a lubricator on his engine, said injury resulting in the loss of plaintiff's left eye and otherwise injuring him. That at said time the defendant owned and kept on said engine a lubricator made partly of metal and partly of glass, and that said lubricator was surrounded by a shield made of metal and which clamped around the glass of the lubricator with a spring. That at said time and for sometime prior

thereto, the defendant had carelessly and negligently maintained said shield and spring in a weak, unsafe, negligent and careless and dangerous condition. That said engine was one which carried 190 pounds of steam and was one of more modern make, and that the said lubricator, spring and shield were made and constructed for use on engines which carried only from 140 pounds to at most 160 pounds of steam, and that said lubricator was not of sufficient strength and size for use upon said engine, and that the defendant carelessly and negligently kept, used and maintained upon
17 said engine the said lubricator which was too weak for use on said engine, and that by reason of its being too weak for use on said engine, the said lubricator spring and shield all endangered the lives, bodies and limbs of all persons who worked upon said engine, and that defendant thus maintained upon said engine the aforesaid lubricator in a careless, negligent, weak and unsafe condition. That owing to the weak unsafe and careless and dangerous condition of said lubricator and said spring, the glass of said lubricator exploded and broke and loosened the spring still further and blew off the said shield, and the said shield by being so blown off, struck the plaintiff in the left eye and cut, crushed, injured and bruised said eye and totally destroyed the use of the same. That at the time of said explosion and for a long time prior thereto, the defendant had maintained the said lubricator and the glass therein and said spring and shield in a weak, unsafe, careless, negligent and dangerous condition. That by reason of said injury, the plaintiff was compelled to go to Omaha for treatment in a hospital where his said eye was removed and he entirely lost the same. That plaintiff has endured and suffered sleeplessness and anguish, pain and suffering, and that by reason of said injury, his nervous system sustained a great shock and his nervous system has been permanently impaired and his health undermined, and he has sustained loss of health, and all of said injuries are permanant. That at the time he received said injuries and for a long time prior thereto, he was earning $157.00 per month and his wages had just been raised by defendant to $175.00 per month. That by reason of the loss of his time alone since sustaining said injuries, he has sustained damages in the sum of $1,750.00, no part thereof has been paid. That plaintiff has been unable to perform any work or labor since sustaining said injuries, and by reason of his loss of time alone and his inability to earn money since sustain-
18 ing said injuries, he has sustained damages in the sum of $1,750.00. That by reason of said injuries the plaintiff has sustained damages in the sum of $31,750.00, and all of said sum is now justly due him from the defendant and no part thereof has been paid, and that plaintiff sustained all of said injuries without fault or negligence on his part. Wherefor- plaintiff prays judgment against the defendant for the sum of $31,750.00.

Instruction No. 2.

The defendant for answer to the plaintiff's petition, admits that defendant is now and was at the times stated in plaintiff's petition

a railway corporation and the owner of and operating a line of railroad in the village of Long Pine, Nebraska, and thence Westward to Chadron in Dawes County, Nebraska, and that said Village of Long Pine is now and has been at all of said times, a division point on the defendant's said railroad. Admits that on the 28th day of November, 1910, the plaintiff was in the employ of the defendant as a locomotive engineer, and that in the night time of said day he was injured in his left eye by the breaking of a lubricator upon the engine upon which he was employed. The defendant denies each and every allegation contained in plaintiff's petition not hereinbefore specifically admitted to be true. The defendant further answering said petition alleges, that the injuries which plaintiff received arose and were due to dangers and risks which were open and obvious and known to plaintiff and were assumed by him. And further answering, the defendant alleges that the injuries received by plaintiff were occasioned by and due to his own ngligence and want of care.

Instruction No. 3.

For reply to defendant's answer, the plaintiff denies each and every allegation contained in the third and forth paragraphs of the answer. That is, plaintiff denies that the injuries which plaintiff
19 received arose from and were due to dangers and risks which were open and obvious and known to plaintiff and were assumed by him. Plaintiff also denies that the injuries received by him were occasioned by and due to his own negligence and want of care.

Instruction No. 4.

In this case, you are instructed that the burden of proof is upon the plaintiff, and before he can recover he must satisfy you by a preponderance of the evidence, that at the time of the injuries complained of and for sometime prior thereto, the defendant had carelessly and negligently maintained the shield and spring and glass in the lubricator in a weak, unsafe, negligent, careless and dangerous condition, and that the glass in said lubricator was not of sufficient strength and size for use upon the said engine or any other engine carrying 190 pounds of steam. That said lubricator glass was not strong enough for use upon said engine, and that the defendant carelessly and negligently kept, used and maintained it upon said engine, and that the use of said glass and said lubricator in the condition in which it was maintained was insufficient and dangerous, and that said fact was then and there known to defendant or had been used by defendant so long and its experience had been such with said glass and said lubricator that it ought to have known that the same was insufficient and dangerous. If you believe from a preponderance of the evidence that the defendant was so negligent and careless as aforesaid, and that the plaintiff was injured as a result of defendant's said carelessness and negligence and without any fault or negligence on his part, then you should find for the plaintiff: otherwise, for the defendant.

Instruction No. 5.

The defendant further alleges in this case that, the injuries which the plaintiff received arose from and were due to the dangers
20 and risks which were open and obvious and known to plaintiff and were assumed by him. And on this question you are instructed that, if the machinery, tools or appliances furnished a servant by his master are obviously defective and dangerous, and the servant notwithstanding, continues in the service, he thereby assumes the risk of any injuries which he may sustain by reason of such defective appliance. And in this case, if you believe that the plaintiff knew of the weak, defective or insufficient condition of the glass in the said lubricator and understood that the same was unsafe and dangerous, and with this knowledge continued to operate the engine for the defendant, then he would not be entitled to recover in this case.

Instruction No. 6.

The defendant alleges that plaintiff's injuries were the result of his own neglect and not from the negligence of the defendant. And you are instructed, that unless you find from the evidence, that the plaintiff, at the time he was injured, failed to exercise that degree of care for his own safety which a person of his age and experience would naturally and ordinarily use in the same situation and under the same circumstances, then you will find that the plaintiff has not been guilty of any such negligence as will defeat his recovery on that ground.

Instruction No. 7.

You are instructed that, although it should appear, and you might find from the evidence in this case, that a lubricator, the glass in which was flat instead of cylindrical in form and which has been described by the witnesses in this case as a 'Bull's Eye' lubricator, was a newer and better appliance for the purpose for which lubricator glasses are used than the one actually in use upon the engine upon which plaintiff was when injured, yet such con-
clusion will not entitle plaintiff to recover in this case for the
21 reason that, it is not charged in plaintiff's petition that defendant failed to provide the latest and most approved appliance in the way of a lubricator glass for use upon this engine. But the jury may consider the new appliance known as the Bull's Eye lubricator which was used on a part of the engines of the defendant company, together with all the other evidence in the case, in determining the question of whether or not the defendant was negligent in not using said later device or Bull's Eye lubricator on the engine in question at the time of plaintiff's injury.

Instruction No. 8.

Negligence is the failure to exercise such care, prudence and forethought as under the circumstances duty requires should be

given or exercised. It may consist in the omission to do something which a reasonably prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do.

Instruction No. 9.

You are instructed, that you should give the same consideration and weight to the instructions requested by plaintiff and defendant and given by the court, as if the same were given by the court on its own motion.

Instruction No. 10.

You are instructed that you are the sole judges of the credibility of the witnesses and the weight to be given to their testimony. In determining such weight and credit, you may take into consideration the appearance of the witness on the witness stand, his demeanor, the manner in which he gives his testimony: his interest in the result of the suit, if such interest appears from the evidence: his opportunity of knowing the facts and things about which he testifies as shown by the evidence: the reasonableness or unreasonableness of the story told by him, and any other fact or circumstance in evidence, tending to corroborate or contradict such witness.

W. H. WESTOVER, *Judge.*

22 Filed December 20, 1911.

In the District Court of Holt County, Nebraska.

WILLIAM BOWER, Plaintiff,
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

Defendant's Exceptions to Instructions.

Comes now the defendant and in the presence of the Court and jury and before the jury retired to consider and deliberate upon their verdict, and at the time the instructions were given and refused excepted to the giving and refusing of instructions as follows.

First. Separately excepted to paragraph Number One of the instructions given to the jury at the request of plaintiff.

Second. Separately excepted to paragraph Number Two of the instructions given to the jury at the request of plaintiff.

Third. Separately excepted to paragraph Number three of the instructions given to the jury at the request of plaintiff.

W. H. WESTOVER, *Judge.*

Fourth. Separately excepted to paragraph Number four of the instructions given to the jury at the request of plaintiff.

Fifth. Separately excepted to the refusal of the court to give paragraph No. One requested by the defendant.

Sixth. Separately excepted to the refusal of the court to give paragraph No. Two requested by the defendant.

Seventh. Separately excepted to the refusal of the court to give paragraph No. Six requested by the defendant.

Eighth. Separately excepted to the refusal of the court
23 to give paragraph No. three requested by the defendant.

Ninth. Separately excepted to paragraph number one of the instructions given to the jury by the court on its own motion.

Tenth. Separately excepted to paragraph number two of the instructions given to the jury by the court on its own motion.

Eleventh. Seperately excepted to paragraph number three of the instructions given to the jury by the court on its own motion.

Twelfth. Separately excepted to paragraph number four of the instructions given to the jury by the court on its own motion.

Thirteenth. Seperately excepted to paragraph number five of the instructions given by the court on its own motion to the jury.

14th. Seperately excepted to paragraph number six of the instructions given to the jury by the court on its own motion.

15th. Seperately excepted to paragraph number seven of the instructions given to the jury by the court on its own motion.

16th. Seperately excepted to paragraph number eight of the instructions given to the jury by the court on its own motion.

17th. Seperately excepted to paragraph number nine of the instructions given to the jury, by the court on its own motion.

18th. Seperately excepted to paragraph number ten of the instructions given to the jury by the court on its own motion.

24 All of the above exceptions seperately taken, by the defendant in the presence of the court and jury before the jury retired to deliberate upon their verdict.

W. H. WESTOVER, *Judge.*

25 Filed Dec. 21, 1911.

Verdict of Jury.

THE STATE OF NEBRASKA,
Holt County, ss:

December Term, A. D. 1911, to-wit: December 21st, 1911.

WILLIAM BOWER, Plaintiff,
vs.
CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Defendant.

We, the Jury in this Case, being duly impaneled and sworn, do find and say that we find for the plaintiff and against the defendant and we assess the amount of plaintiff's damages in the sum of $11,500.00.

G. E. CLABAUGH, *Foreman.*

26 And afterwards to wit on the 22nd day of December, 1911, there was filed a Motion for new trial in words and figures as follows:

In the District Court of Holt County, Nebraska.

WILLIAM BOWER, Plaintiff,
vs.
CHICAGO & NORTH WESTERN RAILWAY COMPANY, Defendant.

Motion for New Trial.

Comes now the defendant in the above entitled cause and moves the court here that the verdict of the jury heretofore returned in this cause, be set aside, vacated and held for naught and that a new trial be granted herein for the following reasons.

1.

The court erred in giving to the jury paragraph Number four of the instructions given to the jury by the court on its own motion, to the giving of which instruction defendant excepted at the time.

2.

The court erred in giving to the jury paragraph number five of the instructions given to the jury by the court on its own motion, to the giving of which instruction, defendant excepted at the time.

3.

The court erred in giving to the jury paragraph number six of the instructions given to the jury by the court on its own motion, to the giving of which instruction, defendant excepted at the time.

4.

The court erred in giving to the jury paragraph number seven of the instructions given to the jury by the court on its own motion, to the giving of which instruction, defendant excepted at the time.

27 5.

The court erred in giving to the jury paragraph number eight of of the instructions given to the jury by the court on its own motion, to the giving of which instruction, defendant excepted at the time.

6.

The court erred in giving to the jury paragraph one of the instructions requested by the plaintiff, to the giving of which instruction, defendant excepted at the time.

7.

The court erred in giving to the jury paragraph two of the instructions requested by the plaintiff, to the giving of which instruction, defendant excepted at the time.

8.

The court erred in giving to the jury paragraph three of the instructions requested by the plaintiff, to the giving of which instruction, defendant excepted at the time.

9.

The court erred in giving to the jury paragraph four of the instructions requested by the plaintiff, to the giving of which instruction, defendant excepted at the time.

10.

The court erred in refusing to give to the jury paragraph one of the instructions requested by defendant, to which refusal, defendant excepted at the time.

11.

The court erred in refusing to give to the jury paragraph two of the instructions requested by defendant, to which refusal, defendant excepted at the time.

12.

The court erred in refusing to give to the jury paragraph
28 three of the instruction requested by defendant, to which refusal, defendant excepted at the time.

13.

The court erred in refusing to give to the jury paragraph six of the instructions requested by defendant, to which refusal, defendant excepted at the time.

14.

The court erred in refusing to give to the jury paragraph seven of the instructions requested by defendant, to which refusal, defendant excepted at the time.

15.

The court erred in overruling the motion of defendant made at the close of the evidence that the jury be directed to return a verdict for the defendant, to which ruling of court defendant at the time excepted.

16.

The verdict of the jury is contrary to the evidence and not sustained thereby.

17.

The verdict of the jury is contrary to law.

18.

The damages allowed are excessive, appearing to have been given by the jury under the influence of passion or prejudice and not warranted by the evidence given and adduced upon the trial.

19.

Errors of law occuring at the trial, to which defendant excepted at the time.

CHICAGO & NORTHWESTERN
RAILWAY COMPANY,
By R. R. DICKSON,
H. C. BROME &
HERMAN AYE,
Attorneys.

29 In the District Court of Holt County, Nebraska.

WILLIAM BOWER, Plaintiff,
vs.
CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Defendant.

Journal.

Now on this 29th day of December, A. D., 1911, this cause came on to be heard upon the motion of the defendant for a new trial herein, and the said motion was submitted to the court and the court, being fully advised in the premises,

It is considered by the court that said motion for a new trial be, and it hereby is overruled, to which defendant excepts. And upon the request of defendant, the defendant is allowed forty days from the adjournment of the term in which to prepare and serve a bill of exceptions herein. This cause then came on to be heard upon the motion of the plaintiff for judgment upon the verdict.

It is therefore considered by the court that the plaintiff William Bower, do have and recover from the defendant, Chicago and North Western Railway Company, the sum of Eleven Thousand Five Hundred Dollars, together with his costs in this action taxed at $—.

To which Defendant duly excepts.

W. H. WESTOVER, *Judge.*

30 Filed March 23rd, 1912.

In the District Court of Holt County, Nebraska.

WILLIAM BOWER, Plaintiff and Appellee,
vs.
CHICAGO & NORTH WESTERN RAILWAY COMPANY, Defendant and Appellant.

Notice of Appeal by Appellant.

To the above named plaintiff and M. F. Harrington, his attorney:

In compliance with the Statute of the State of Nebraska and the rules of the Supreme Court of said state relating to appeals to said Court, the Chicago & North Western Railway Company, defendant and appellant herein, files this notice of appeal to the Supreme Court of the State of Nebraska, and notice of intention of said appellant to prosecute such appeal from the judgment heretofore to-wit, on the 29th day of December, A. D., 1911, rendered in favor of the plaintiff and again-t the defendant in the District Court of Holt County, Nebraska. for the sum of $11,500.00 damages and costs of suit taxed at $68.82, in an action wherein William Bower was plaintiff and the Chicago & North Western Railway Company was defendant. William Bower, plaintiff in said action, is appellee herein, and is designated as Plaintiff and Appellee, and the Chicago & North Western Railwoy Company, defenddant in said action, is appellant herein, and is designated as Defendant and Appellant.

CHICAGO & NORTH WESTERN
RAILWAY COMPANY,
By B. H. DUNHAM &
HERMAN AYE,
Its Attorneys.

31 Filed and Approved March 23rd, 1912.

In the District Court of Holt County, Nebraska.

WILLIAM BOWER, Plaintiff,
v.
CHICAGO & NORTH WESTERN RAILWAY COMPANY, Defendant.

Supersedeas Undertaking.

Know all men by these presents:

That the Chicago & North Western Railway Company, as principal, and the National Surety Company, a corporation of the State of New York, as surety, are held and firmly bound unto William Bower in the sum of $23,500.00, for the payment of which we jointly and severally bind ourselves, our and each of our suc-essors and assigns.

The condition of this obligation is such that, Whereas the said Chicago & North Western Railway Company has filed in the Supreme Court of the State of Nebraska its record and appeal to reverse the judgment rendered by said District Court in the above entitled action on the 29th day of December, A. D., 1911, in favor of the plaintiff and against the defendant for the sum of $11,500.00 and $68.82 costs.

Now if the said Chicago & North Western Railway Company will pay the judgment, consideration money and costs in case said judgment shall be affirmed in whole or in part, then this obligation to be void, otherwise to remain in full force.

Dated this 19th day of March, A. D. 1912.

CHICAGO & NORTHWESTERN RAILWAY COMPANY,
By B. H. DUNHAM, *Its Attorney.*

NATIONAL SURETY COMPANY,
[SEAL.] By T. L. McGARRY,
Attorney-in-Fact.

The execution of the foregoing undertaking and the sufficiency of the surety therein are hereby approved by me on the 23rd day of March, A. D. 1912.

[SEAL.] JOHN A. HARMON,
Clerk of the District Court.

32 And on the same day there was filed in the office of the clerk of said supreme court a certain Bill of Exceptions, in the words and figures following, to-wit:

In the District Court of Holt County, Nebraska.

WILLIAM BOWER, Plaintiff,
vs.
CHICAGO & NORTH WESTERN RAILWAY COMPANY, Defendant.

Bill of Exceptions.

Appearances:

M. F. Harrington and Hugh J. Boyle for the plaintiff.
H. C. Brome, Herman Aye and R. R. Dickson for Defendant.
Hon. W. H. Westover, judge, presiding.

Be it remembered that on the 19th day of December, 1911, that being one of the days of the regular December 1911 Term of the District Court of Holt County, Nebraska, the above entitled cause came on for trial before the court and a jury, the Hon. W. H. Westover, judge presiding. That to maintain the issues joined, the said plaintiff and defe-dant, offered and introduced the following oral and documentary evidence, interposed the objections and took exceptions to the rulings thereon as hereinafter set forth:

O'NEILL, NEBRASKA, December 19, 1911.

Juey impaneled and sworn. Opening statements made.

Trial proceeds:

33 Mr. HARRINGTON: The plaintiff now offers in evidence the deposition of Harry Mackey, taken on behalf of the plaintiff before G. T. H. Babcock, Notary Public at Chadron, Nebraska, October 31st, 1911.

No objections being interposed, same is admitted and read in evidence as follows:

Depositions of Witnesses Taken to be Used in an Action Pending in the District Court of Holt County, in the State of Nebraska, wherein William Bower is Plaintiff and Chicago & North Western Railway Company is Defendant.

In pursuance of the notice hereto attached and at the time and place stated therein, the said William Bower plaintiff, appearing by his attorney, M. F. Harrington, and Chicago & Northwestern Railway Company appearing by its attorney, H. C. Brome.

It was stipulated by and between the parties to this action, that the testimony of the plaintiff's witnesses be taken in shorthand and transcribed at the convenience of the Notary without the necessity of being signed by the witnesses and may be read in evidence without the signature of either witness so far as it may be deemed to be competent.

And thereupon, the said plaintiff produced the following witnesses in their order, to-wit: James Huston, Harry Mackey, Henry C. Walford, C. D. Shrider, R. E. Landis, Orville Collins, J. F. Stanton, who each were by me first duly sworn to testify to the truth, the whole truth and nothing but the truth,— testified as follows:

Mr. MACKEY, called on behalf of plaintiff and testified as follows:

Questioned by Mr. HARRINGTON:

Q. What is your name?
A. My name is Harry Mackey.
34 Where do you live?
A. Chadron, Nebraska.
Q. What is your business?
A. I am trying to fill the position as locomotive engineer.
Q. For what company?
A. For the North Western.
Q. You mean the Chicago & North Western Railway Company?
A. Chicago & North Western Railway Company.
Q. How long have you been an engineer for that company?
A. Twenty years.
Q. On what division have you worked?
A. Black Hills Division.
Q. Where is the headquarters for that division?
A. Chadron.

Q. Do you know the different kinds of lubricators that the defendant has had in use on its locomotives since you have been working for it on this division?

Objected to by the defendant as incompetent, irrelevant and immaterial.

Mr. BROME: Objection withdrawn.

A. Well, I do not know—no I do not think I could say as to that.

Q. Does the defendant use on its engines in this division a lubricator used with a glass in it known as the Bull's Eye?

A. Yes, there is such a thing here.

Q. Describe these lubricators known as the Bull's Eye with this glass in it?

A. Well, it is heavy glass and it is eye shaped, round, perfectly round, heavy glass. I could not give exact thickness.

Q. Which is the most recent kind of glass in use in these lubricators in these engines on defendant's railroad?

35 Defendant objects as incompetent, irrelevant and immaterial.

Objection overruled. Defendant excepts.

A. We have been using both kinds here. I would be unable to say the majority which way. Last class of engines, class Q, all equipped with Bull's Eye lubricators.

Q. How long has this Bull's Eye lubricator on larger class of engines been in use?

A. Well, ever since that class of engine has been here. They have been here I should judge close to ten years.

Q. What pressure are these larger engines made to stand?

Defendant objects as incompetent, irrelevant and immaterial.

Mr. BROME: Objection withdrawn.

A. Well, they are set for two hundred pounds of steam.

Q. The class of engines in use before that, what pressure were they made to stand?

Defendant objects as incompetent, irrelevant and immaterial.

Objection overruled. Defendant excepts.

A. Well, we had a small class of engines here in early days, take it eighteen or twenty years ago, we had what was called "Standard" engines. They carried only 140 pounds of steam.

Q. Are some of that same class of engines carrying only 140 pounds pressure in the boiler, still in use on this division?

Defendant objects as incompetent, irrelevant and immaterial.

Objection overruled. Defendant excepts.

A. Yes, there are some of them here: some working, switching in yards: I do not think any of them are on the road service.

36 Q. What kind of glass in the lubricators on these smaller engines which carried 140 pounds pressure?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. Well, they were an up and down glass just like there is a glass over there (pointing to thermometer) similar to that in thermometers.

Q. Do you know whether that kind of glass was used at all in recent years in these larger engines which carry*ing* something like two hundred pounds steam pressure?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. Yes, sir, I had them lubricators on these high pressure engines.

Q. Do you know from expre*i*nce the effect or result from using these glasses that were made for 140 pound pressure engines upon these engines with 200 pounds pressure?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. Now, I do not understand. You ask me what my experience was with it? Well, I have had experience with both kinds of glasses.

Q. What then, has been your observation as to the use of this glass for use on these 140 pound engines when used on these 200 pound pressure engines?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

37 A. Well, it is my experience with them that they break once in a while.

Q. How frequently have these glasses that were made for 140 pound pressure engines and which were used on engines having 200 pound pressure broken with you?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. They broke on the low pressure engines with me quite often too. They broke on the low pressure engines with me quite often.

Q. How about the high pressure engines?

A. They have also broke on the high pressure engines.

Q. Why do these break?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. Well, sir, I do not know what causes them to break. You take a cold side wind blowing in on them sometimes chills them and causes them to break.

Q. To be plain, Mr. Mackey, these glass — in order to be safe have to be made to stand the same steam pressure as the boiler of the engine?

Defendant objects as incompetent, irrelevant and immaterial, and leading.

Objection overruled. Defendant excepts.

A. They certainly do, because the boiler pressure is right on when your lubricator is work.

Q. Did you ever sustain any personal injury or scar as a result of the explosion of these older class of lubricators?

38 Defendant objects as incompetent, irrelevant and immaterial.

Objection overruled. Defendant excepts.

A. No, sir.

Q. What has been your observation of the use of these Bull's-Eye lubricators?

Defendant objects as incompetent, irrelevant and immaterial.

Objection overruled. Defendant excepts.

A. I think they are a fine thing and I believe they are perfectly safe: never known one to break a glass.

Q. Did you ever report to any foreman of the defendant anything with reference to this old class of lubricators?

Defendant objects as incompetent, irrelevant and immaterial.

Objection overruled. Defendant excepts.

A. No, sir.

Witness excused.

Mr HARRINGTON: The plaintiff now offers in evidence the deposition of Henry C. Walford, taken at the same time and place.

No objections being interposed, same is admitted and read in evidence as follows:

Mr. HENRY C. WALFORD, called on behalf of plaintiff and testified as follows:

By Mr. HARRINGTON:

Q. Where do you reside?

A. Chadron, Nebraska.

39 Q. What is your business?

A. Locomotive Engineer.

Q. By what company are you employed?

A. Chicago & North Western.

Q. You mean the Chicago & North Western Railway Company?

A. Yes sir.

Q. On what division do you run?

A. On the Black Hills Division.

Q. Where are the headquarters of that division?

A. Chadron.

Q. How long have you been employed as locomotive engineer by the defendant on this division?

A. Twenty-four years the 11th day of last August.

Q. Are you familiar with the class of lubricators that have been in use on the defendant's engines for a number of years now?

A. Yes sir.

Q. Is there a class of lubricators having a glass in them known as the Bull's Eye?

A. Yes, I believe so.

Q. Do you know what kind of engines they were first put in use on this division?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. First one have used was on what is call- class "Q" engines.

Q. How long ago did they put on this class "Q" engines here?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

40 A. Well, I think they were here about 1907, probably 1906, I would not be positive unless I looked it up.

Q. What steam pressure on the boiler do these class "Q" of engines carry?

Defendant objects as immaterial. Objection overruled. Defendant excepts.

A. 190 pounds.

Q. Then what pressure would the glass in the lubricators have to be able to stand?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. It would have to be able to withstand 190 pounds boiler pressure.

Q. The engines in use before class "Q" on this division, were they larger or smaller than class "Q."

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. They were smaller.

Q. What steam pressure were the boilers made to withstand in the smaller class of engines?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. Well, they were some different—pressure according to the size of the engine—some carry 120, 130, 140, 150 and 160.

Q. Pounds, you mean?

A. Yes.

Q. What kind of glass were used in the lubricators on
41 these smaller class of engines?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. Well, they were—the glass was of the same shape and pattern; if there was any difference, in the quality, I could not say.

Q. What is the name given to the glass that was used in the lubricator in the smaller class of engines?

A. Name of the glass?

Q. Yes.

A. I cannot tell you the name. I do not think any name — stamped on them. I think they are a foreign glass made in some foreign country.

Q. What is your personal experience as an engineer with the use of the glass in these lubricators used on the smaller class engines?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. Well, my expere*i*nce is, that they sometimes would break. Sometimes last good long time, sometimes last a very short time.

Q. After the company put on these class "Q" engines, did it use these Bull's Eye glasses on the "Q" engines all the time?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. No, sir, not when they first put the engines on. I do not think when they first built the class "Q" engines that there was Bull's Eye lubricators manufactured. If there was, I never heard of it or seen it.

42 Q. How long have these Bull's Eye lubricators been in use on engines on this division? How long since they first began to use Bull's Eye on this division?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. Well, I think it has been two and a half or three years. I would not be positive, but I think so, as near as my recollection —.

Q. To what extent are these Bull's Eye lubricators in use on the "Q" engines on this division? That is, whether all the "Q" engines have all these Bull's Eye lubricators, and if not, what proportion?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. Well, I think all we have on this division are equipped with Bull's Eye lubricators on this division at this time. Of course, I do not run all the engines.

Q. What is your personal observation as to the difference and results and defects in the use on these "Q" engines of the Bull's Eye lubricators and the use of these lubricators that were used on the smaller engines?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. My experience is that they were better lubricators for all purposes.

Q. How about the matter of breaking?

A. I have never had a Bull's Eye lubricator break a glass with me.

43 Q. Did you ever personally make any report about the breaking of these other lubricators to any foreman of the defendant?

Defendant objects as incompetent, irrelevant and immaterial.
Objection overruled.
Defendant excepts.

A. It is the duty to report a glass broken and have one put in and in that way, I have.

Witness excused.

Mr. HARRINGTON: The plaintiff now offers in evidence the deposition of Mr. C. D. Shrider.

No objections being interposed, same is admitted and read in evidence as follows:

Mr. SHRIDER.

By Mr. HARRINGTON:

Q. What is your name?
A. C. D. Shrider.
Q. Where do you live?
A. Chadron.
Q. Your occupation?
A. Engineer.
Q. By what company are you employed?
A. Chicago & Northwestern.
Q. How long have you been employed by that company?
A. Fourteen years.
Q. Have you been an engineer during that period?
A. No sir.
Q. How long have you been an engineer?
A. Ten years.

44 Q. Are you familiar with the kinds of lubricators in use on the engines of the defendant company—Chicago & North Western Railway Company—on the Chadron Division for the last ten years?

Defendant objects as incompetent, irrelevant and immaterial.
Objection overruled. Defendant excepts.

A. No, not the last ten years on the Chadron Division.
Q. How long have you been familiar with the lubricators that they have been using on the Chadron division?
A. It has been about five years that I have been on the Chadron division.
Q. Where did you work for the defendant before that?
A. On the Eastern division out of Norfolk.
Q. What is known as the Norfolk division?
A. It is the Eastern division of the Chicago & North Western Railway Company.
Q. Has there been any change in the lubricators used on the defendants' engines since you have been working for it?

Defendant objects as incompetent, irrelevant and immaterial.
Objection overruled. Defendant excepts.

A. Well, we have different lubricators than we had when I commenced working for it.

Q. What is the latest kind of lubricators in use on the defendant's railroad on the Chadron Division?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. Well, there is what is known as the Bull's Eye lubri-
45 cators.

Q. How long has this Bull's Eye lubricator been in use on the defendant's engines, to your knowledge?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. Well, I do not know exactly, something about two years, the first one I noticed.

Q. What class of engines are these Bull's Eye lubricators used on?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. Well, they are used on all the engines—part of them, excepting Standard small engines.

Q. What is the class name for the larger engines in use on this division?

A. "R's "L's and the "Q's".

Q. Which is the largest engine in use on this division?

A. "R 1".

Q. Do you know what steam pressure the boilers on the "Q" engines are made to withstand?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. Well, they are supposed to carry 190 pounds pressure.

Q. Before the company used the Bull's Eye lubricators on this Chadron division, what kind of lubricators was it using?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

46 A. What is called the Nathan Sight Feed Lubricators.

Q. Have you had some personal experience with this last class of lubricators? I mean the Nathan Sight Feed lubricators?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. I have.

Q. What has been your experience in the use of these Nathan Sight Feed lubricators?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. In what way?

Q. That is to whether they explode?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. Well, I never had any lubricator explode.
Q. Did you ever have any break?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. No lubricator break, no.
Q. Now, Mr. Shrider, I refer to the glass in the lubricators and which is a part of the lubricator. What is your experience in the use of the class of lubricators which the company was using before it began to use the Bull's Eye lubricators?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. Well, I have had several glasses to burst.
Q. And what has been your experience in the use of the Bull's Eye lubricators?

47 Defendant objects as incompetent, irrelevant and immaterial.
Objection overruled. Defendant excepts.

A. Well, experience in what way?
Q. Whether any of them broke?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. I never had any to break on Bull's Eye.

Witness excused.

Mr. BOYLE: The plaintiff now offers in evidence the deposition of Dr. Harold Gifford, taken at Omaha, Nebr. Oct. 20th, 1911.
No objections being interposed, same is read in evidence as follows:

Depositions of Sundry Witnesses Taken Before Me, Myrtle A. Kelley, a Notary Public Within and for the County of Douglas, State of Nebraska, on the 20th Day of October, A. D. 1911, Between the Hours of Two and Six O'clock P. M. and Continued Pursuant to Annexed Notice, to Take Depositions and Stipulation of the Parties Hereto, in the County of Douglas, in the Brandeis Theatre Building, at Omaha Nebraska.

Appearances:

M. F. Harrington, attorney for plaintiff.
H. C. Brome, Attorney for Defendant.

It is hereby stipulated and agreed by and between the attorney for the plaintiff and the attorney for the defendant, that the
48 taking of this deposition herein be adjourned from two o'clock in the afternoon of October 20th, 1911, at 706

Brandeis Theatre Building, in the City of Omaha, County of Douglas and State of Nebraska, until 1:30 o'clock in the afternoon of October 21st, 1911, at 567 Brandeis Building, in the City of Omaha, County of Douglas and State of Nebraska.

At which time, 1:30 o'clock in the afternoon, Saturday, October 21st, 1911, the hearing was commenced and the deposition of Dr. Harold Gifford taken at 567 Brandeis Building, the office of Dr. Gifford, in the city of Omaha, County of Douglas and State of Nebr.

Dr. H. GIFFORD, being first duly cautioned and sworn by the Notary, testified as follows:

E-amined in chief by Mr. HARRINGTON:

Q. What is your name?
A. Harold Gifford.
Q. Where do you live?
A. Omaha.
Q. What is your business?
A. Occulist and aurist.
Q. How long have you been engaged in that business in the County of Omaha?
A. Twenty-five years.
Q. Are you a regularly registered occulist and aurist in the State of Nebraska?
A. I have been registered once or twice, but there may have been some law passed since I registered last that I have not complied with, I don't know.
Q. How long has it been, Doctor, since you registered last?
A. About ten years, I think.
Q. Of what college are you a graduate, Doctor?
49 A. University of Michigan.
Q. Are you acquainted with William Bower in Chadron, Nebraska?
A. I have his record here which would indicate that I saw him on November 29th, first.
Q. The 29th of November last?
A. Yes sir.
Q. Do you know whether anyone came in with him or not?
A. I don't remember.
Q. Did you do anything for him at that time?
A. Yes sir.
Q. What was it?
A. I looked over his eyes and sent him to the Hospital.
Q. You sent him to the hospital?
A. Yes sir.
Q. What did you find, Doctor, as to the condition of his eyes?
A. His left eye was cut through the inner lower quadrant of the cornea extending out of the clera on each side.
Q. What was the proper treatment for that eye and what did you then do?

A. The proper treatment for the eye was—I tried by giving him what we call Antiphlogistic treatment to save the eye. I had to operate and I covered the wound with conjunctiva, but after doing this, the eye did not improve enough to warrant trying to save it on account of the danger of the loss of sight of the other eye, and I then eviscerated the eye.

Q. Explain it more fully please ?

A. Well, I scraped out the contents of the eye.

Q. What effect did that have on the sight?

A. There was no sight there.

Q. Was there any sight there when Mr. Bower came to you?

A. Nothing except the perception of light.

50 Q. Nothing except the perception of light.

A. No. sir.

Q. Doctor, what destroyed the sight?

Mr. BROME: Defendent objects to the witness testifying to what he was told.

By the COURT: Objection sustained and the last part of the answer is not read.

A. I don't know. He told me that he had been injured by a lubricator exploding.

Q. Could you tell from your examination of the eye that he had had sight at one time?

A. No, I could not tell whether he had had sight.

Q. What would the probable effect of such an explosion be upon the eye?

A. It would destroy the eye.

Q. He had no sight when he came to you?

A. Nothing except the perception of light.

Q. That was all?

A. Yes sir.

Q. In your opinion Doctor, was the operation which you performed upon him necessary?

A. I would not have done it if it had not been necessary.

Q. I will have to ask you to answer yes or no Doctor, was it necessary?

A. Yes sir, it was.

HAROLD GIFFORD.

51 Mr. HARRINGTON: The plaintiff now offers in evidence the deposition of Orville Collins, taken at Chadron, Nebr. Oct. 31st, by the plaintiff.

No objections, same is admitted and read in evidence as follows:

Mr. ORVILLE COLLINS.

By Mr. HARRINGTON:

Q. Where do you live Mr. Collins?

A. Chadron, Nebraska.

Q. What is your business?

A. Locomotive engineer.

Q. Are you employed by the Chicago & North Western Railway Company?

A. Yes sir.

Q. On what division?

A. On what is called the Black Hills division, that is west of Long Pine.

Q. Where is the headquarters of that division?

A. Chadron.

Q. How long have you been employed on this Black Hills division as locomotive engineer by the defendant railroad company.

A. I have been employed as an engineer twenty-one years.

Q. During that time have you known the kinds of lubricators in use on the defendant's locomotive engines on this division?

A. Yes sir.

Q. What is the latest kind of lubricators in use on this division?

Defendant objects as incompetent, irrelevan*ant* and immaterial. Objection overruled. Defendant excepts.

52 A. Why, the latest lubricators we have is the Nathan lubricator called the Bull's eye.

. There are different kinds of Nathan lubricators, as I understand?

A. Yes, sir, the old kind did not have what we call the Bull's Eye glass.

Q. How long has this Bull's Eye lubricator been in use on this Black Hills division?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. I do not know as I can answer that accurate, but I can answer pretty near. The last "Q" engines when they came here had the Bull's eye lubricators. About four years ago.

Q. About four years ago?

A. Yes sir.

Q. Before that, what kind of lubricators had been in use?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. We had the Nathan lubricators, but they had the old style glass. I do not know whether you call it old style. It was different kind—thin glass put in in a different manner and different shape from the other glass.

Q. Which is the thicker glass? The old style glass, as you call it, or the glass in the Bull's eye lubricators?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

53 A. The glass in the Bull's eye lubricators is the thicker glass.

Q. Have you, in working for the defendant, used both of these lubricators?

A. Yes sir.

Q. What has been your experience in the use of the Bull's Eye lubricators as to whether they explode or not?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. There never has been any explosion of the Bull's Eye lubricators to my knowledge since they have been on the division.

Q. What has been your experience with the other class of lubricators in the use, I mean the class other than the Bull's Eye?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. Why, I have had glass break with me in the other style lubricators, of course, I could not tell how many, I have had quite a number break.

Q. On and prior to November 28, 1910, were you familiar with the defendant's locomotive engine bearing the number 284?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. No, I was not running that engine at that time.

Q. Had you observed the lubricator upon it?

A. No, I could not say that I had observed it. It had the old style lubricator.

Q. What kind of lubricator was in use at that time on that engine?

54 A. It was the Nathan lubricator, but the old style.

Q. And what class of engine was this number 284?

A. It was an "R" engine.

Q. You mean "R" or "R-1"?

A. I mean "R".

Q. Do you know what pressure the boiler of that engine was made to withstand?

A. 190 pounds.

Q. How long have these "R" engines been in use on this division?

A. I could not tell you accurate, but they have been up here to my knowledge for four or five years.

Q. Is it a larger or smaller engine than the engine formerly in use on this division?

A. It is a larger one. That is, larger at the time this certain engine was in service.

Q. What was the largest class of engines in service on this division in November 1910?

A. Class "R-1".

Q. And what was the next largest one?

A. Class "R".

Cross-examination by Mr. H. C. BROME:

Q. When you speak of the size of engines, do you rate them by the steam pressure?

A. No, it is not steam pressure. It is rated by the size of the cylinder.

Q. So that an engine with a larger cylinder even though it had a smaller pressure, would be rated higher than an engine with a smaller cylinder, and a higher steam pressure? Is that correct?

A. I do not hardly understand you.

55 Q. I will try to make it plain. You said that the engines as to size when you speak of larger or smaller, refer to the size of the cylinder and not necessarily to the steam pressure?

A. No sir, it does not necessarily refer to the steam pressure.

Witness excused.

Mr. HARRINGTON: The plaintiff now offers in evidence the deposition of R. E. LANDIS, taken at the same time and place as the preceeding deposition.

No objection, same is admitted and read in evidence as follows:

Mr. R. E. LANDIS, Called on behalf of behalf of plaintiff, testified as follows:

By Mr. HARRINGTON:

Q. Where is your home, Mr. Landis?

A. Chadron, Nebraska.

Q. Your business?

A. Locomotive engineer.

Q. Are you an engineer in the employ of the Chicago & North Western Railway Company?

A. Yes sir.

Q. How long have you been a locomotive engineer for that company?

A. About eleven years.

Q. Are you familiar with the lubricators in use on the Company's engines during that time?

A. Yes sir.

Q. What is the latest kind of lubricators this company has been using?

Defendant objects as incompetent, irrelevant and immaterial.
Objection overruled. Defendant excepts.

56 A. Bull's eye lubricators. Nathan Bull's eye.

Q. How long have these Bull's eye lubricators been in use on the defendant's engines, to your knowledge?

Defendant objects as incompetent, irrelevant and immaterial.
Objection overruled. Defendant excepts.

A. Well, I do not know what you mean, whether you mean on the Black Hills division or where.

Q. Anywhere on its engines, to your knowledge.

Defendant objects as incompetent, irrelevant and immaterial.
Objection overruled. Defendant excepts.

A. Since 1906.

Q. Where did you first know the defendant to be using the Bull's eye lubricators on its engines?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. First I knew of it was at Chadron where I am working.

Q. Then they have been in use on the Chadron division since 1906?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. Been in use on some of the engines.

Q. What class of engines have they been in use on?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. Class "Q", class "R-1" and class "L's".

57 Q. When were these "Q" engines on this division?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. Well, about ten years ago was first class "Q" engine on this division.

Q. How long has class "L" been on this division?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. About two years and a half.

Q. Before the company used the Bull's eye lubricators, what kind of lubricators was it using?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. It is a lubricator with a cylinder glass in, the Nathan lubricator.

Q. What has been your personal experience in the use of these lubricators which was earlier in use on this division and particularly with *use* to the glass therein?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. Do you mean any particular class of engines?

Q. Well, you may tell me your experience, Mr. Landis, in using this earlier lubricator with the round glass, as you have termed it I believe, in the different classes of engines on this division?

Defendant objects as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

58 A. Well, I have used them on all classes and have had some trouble with them breaking, a good many times due to my own negligence.

Q. Have you sustained any personal injury yourself by the use of one of these early lubricators?

Defendant objects as incompetent, irrelevant and immaterial.
Objection overruled. Defendant excepts.

A. Yes sir.
Q. What was that?

Defendant objects as incompetent, irrelevant and immaterial.
Objection overruled. Defendant excepts.

A. Well, I carry the mark there. I cannot very well get away from it. (Pointing to the right side of his face.)
Q. What class of engine were you using at the time you received this injury?

Defendant objects as incompetent, irrelevant and immaterial.
Objection overruled. Defendant excepts.

A. Class "Q."
Q. And what caused the injury?
Defendant objects as incompetent, irrelevant and immaterial.

Objection overruled. Defendant Excepts.

A. Sudden change of temperature on the glass caused by my removing the shield.
Q. What has been your experience in the use of the Bull's Eye lubricators?

59 Defendant objects as incompetent, irrelevant and immaterial.
Objection overruled. Defendant excepts.

A. Very satisfactory.
Q. Did you ever have one of them break?

Defendant objects as incompetent, irrelevant and immaterial.
Objection overruled. Defendant excepts.

A. I do not exactly understand the question. Do you mean blow out, break, or crack?
Q. Did you ever have an explosion with one of these Bull's Eye lubricators?

Defendant objects as incompetent, irrelevant and immaterial.
Objection overruled. Defendant excepts.

A. Never had any explosion.

Witness excused.

Mr. HARRINGTON: The plaintiff now offers in evidence the deposition of J. F. Stanton, taken at Chadron, Nebraska.
No objections being interposed, same is admitted and read in evidence as follows:

Mr. STANTON, Called as a witness on behalf of the plaintiff, testified as follows:

By Mr. HARRINGTON:

Q. What is your name?

A. J. F. Stanton.
60 Q. Where do you live?
A. Chadron.
Q. What is your employment?
A. I am in the shoe business.
Q. Were you ever employed by the Chicago & North Western Railway Company?
A. Yes sir.
Q. When did you quit working for that company?
A. In 1908.
Q. What time in 1908?
A. First of July.
Q. What was your occupation with that company?
A. Engineer.
Q. On what division were you employed?
A. Principally this division out of Chadron.
Q. How long were you locomotive engineer for Chicago & North Western Railway Company?
A. I went to work for them in March 1885.
Q. During the time you worked for them, did they have different kinds of lubricators on their engines?
A. Yes, sir.
Q. What was the last kind of lubricators put in use on the defendant's engines on this Chadron division?

Defendant objects as incompetent, irrelevant and immaterial.
Objection overruled. Defendant excepts.

A. Well, Mr. Harrington, I do not understand the question.
Q. What was the last style of lubricators put in use by the defendant on their engines?
61 A. I would say that is was the Detroit Bull's Eye lubricator.
Q. There is a Nathan make?
A. I believe there is, yes sir.
Q. How long ago since defendant began using a Bull's Eye lubricator upon its engines?

Defendant objects as incompetent, irrelevant and immaterial.
Objection overruled. Defendant excepts.

A. To the best of my recollection, of course this is including time I have been away from the service, it is probably four or five years that I know of. This is off hand. I could not state positively.
Q. On what class of engines were the Bull's eye lubricators in use on this division?

Defendant objects as incompetent, irrelevant and immaterial.
Objection overruled. Defendant excepts.

A. First I saw was on Class "Q" engine.
Q. Before the company used the Bull's Eye lubricators on this division, what kind of lubricators was in use on defendant's engines?

Defendant objects as incompetent, irrelevant and immaterial.
Objection overruled. Defendant excepts.

A. Well, what was known as the Nathan lubricator.
Q. What was the form of the glass in that lubricator?

Defendant objects as incompetent, irrelevant and immaterial.
Objection overruled. Defendant excepts.

62 *Defendant objects as incompetent, irrelevant and immaterial.*
Objection overruled. Defendant excepts.

A. Round.
Q. Do you know from observation how the thickness of the glass in these round lubricators compared with the thickness of the glass in the Bull's Eye lubricators?

Defendant objects as incompetent, irrelevant and immaterial.
Objection overruled. Defendant excepts.

A. Well, sir, I would say that a Bull's Eye lubricator glass is three or four times thicker than the ones in the round glass.
Q. What was your personal expereience in the use of these Bull's Eye lubricators that is, whether the glass broke by explosion or not?

Defendant objects as incompetent, irrelevant and immaterial.
Objection overruled. Defendant excepts.

A. My expereience was that it was a good lubricator.
Q. My question is, what your experience was in using these Bull's Eye lubricators in operating these engines, as to whether the glass in the Bull's Eye lubricators in using it exploded or did not explode?

Defendant objects as incompetent, irrelevant and immaterial.
Objection overruled. Defendant excepts.

A. It did not explode.
Q. Mr. Stanton, what was your experience in the use of this other class of lubricators with the round glass as to whether the glass in these lubricators was broken by explosion or not?

63 Defendant objects as incompetent, irrelevant and immaterial.
Objection overruled. Defendant excepts.

A. Well, sir, never could tell when they were going to break.
Q. What was your own personal expereince as to whether they did break or did not break?

Defendant objects as incompetent, irrelevant and immaterial.
Objection overruled. Defendant excepts.

A. I have had a good many of them break.
Q. Did you know the defendant's locomotive engine which bore the number 284?
A. Only by sight.
Q. Did you observe the lubricator in use on that engine?
A. No sir. I was out of the service at that time.
Q. Well, did you know that engine when you were in the Company's service?

A. I do not think I ever saw it.
Q. Then you had never seen the lubricator on this engine 284?
A. No sir.
Q. What class of engine was 284, if you know?
A. I do not know.

Witness excused.

WILLIAM BOWER, Being called and sworn as a witness in his own behalf as plaintiff, testified as follows:

Questioned by Mr. HARRINGTON:

Q. What is your name?
64 A. William Bower.
Q. And where is your home at this time?
A. Missouri Valley, Iowa.
Q. Before that where did you live?
A. Chadron, Nebraska.
Q. How long has your home been at either Chadron or Missouri Valley?
A. Well, we lived in Missouri Valley about fifteen years, Chadron twelve years and then to Missouri Valley again.
Q. Do you own property back in Iowa?
A. Yes sir.
Q. And you are living back there at the present time?
A. Yes sir.
Q. Mr. Bower, when did you first go to work for the Chicago & North Western Railway Company on some of its divisions?
A. I went to work for them in '85, the 5th of March.
Q. Where was that?
A. Missouri Valley.
Q. What was the name of the company at that time operating the railroad?
A. I went to work for the Northwestern people. There was two agents there, and I was hired under the Northwestern agent.
Q. What other roads were there?
A. The Sioux City & Pacific and F. E. & M. V. Fremont, Elkhorn & Missouri Valley.
Q. After that where did you work?
A. I went to work in the round house for the F. E. & M. V. or Sioux City & Pacific, and then went on an engine.
65 Q. When did you begin to run an engine for the Sioux City & Pacific?
A. The second of December, '87.
Q. And how long did you continue running an engine for them?
A. Well, until the 28th of last November.
Q. That is for that company and this company too?
A. Yes.
Q. A year ago last November?
A. Yes, sir, a year ago last November.
Q. After the Sioux City & Pacific, what road succeeded them?

A. The Sioux City & Pacific was put into the hands of the Chicago & North Western Railroad.

Q. Well did you ever work for the Fremont, Elkhorn & Missouri Valley Railroad Company?

A. Yes sir.

Q. That is this road that runs through here.

A. Yes sir.

Q. How many years did you work for them?

A. I worked for them until, I think, something like ten years ago since the North Western took charge, I worked from '85 until ten years ago or such time the North Western took charge of the F. E. & M. V.

Q. So the last ten years, this same railroad has been operated by the defendant company.

A. Yes sir.

Q. And you have been working for them?

A. Yes sir.

Q. What were you doing for the Chicago & North Western Railway Company the last ten years?

66 A. Running a locomotive engine.

Q. And you have been running an engine how long?

A. Since the 2nd of December '87, it is 25 years, in the neighborhood of 25 years.

Q. How long did you run on the Chadron division of the Chicago & North Western Railway Company?

A. Ever since the road was built, I would occasionally run an extra up there, sometimes take an engine to Chadron, to and from: but been in the regular service there about twelve years.

Q. Were you working for them the night of November 28, 1810?

A. Yes sir.

Q. I believe that is the date of your injury, isn't it?

A. Yes sir.

Q. What were you doing that night?

A. Running a locomotive engine for the North Western people.

Q. Where was your engine?

A. At Long Pine.

Q. And where was it that evening early, along in the early part of the evening?

A. In the round house at Long Pine.

Q. Who fired it?

A. Well, sir, that I couldn't say, it was in charge of the night foreman.

Q. About what time did you go upon the engine?

A. I went upon the engine about 10:30, Mountain time.

Q. Mountain time.

A. Yes sir.

Q. Where was the engine at that time?

A. In the round house at Long Pine.

67 Q. One of the defendant's engines?

A. Yes sir.

Q. What was its number?

A. No. 284.
Q. What was its class?
A. Class R.
Q. How do these engine compare in size with other engines?
A. Well, in size they are the largest engine we have in the service.
Q. Do you know the boiler pressure it is made to withstand?
A. Yes sir.
Q. How much?
A. 190 pounds.
Q. What did you go to doing when you got on the engine that night?
A. My duty, which is to prepare to take the engine out, oil the engine, run it down on the track, get it ready to take to Chadron.
Q. What train were you to haul to Chadron?
A. Train No. three, I think it was.
Q. Was that a freight or passenger train?
A. Passenger train.
Q. Was it necessary for you to be on this engine to do this work before starting on the trip?
A. Yes sir, it is our duty.
Q. And did you do that regularly?
A. Yes sir, at all times.
68 Q. Did anything happen to you that night while you were at work on the engine of the defendant?
A. Yes sir.
Q. What was it?
A. I lost my left eye.
Q. I lost it by an explosion of the glass in the lubricator, blowing the shield off and cutting my eye ball.
Q. What kind of lubricator was on this engine?
A. Known to us as the old style Nathan.
Q. Was this engine moving at the time the glass exploded?
A. No sir, we were standing still.
Q. On the track?
A. On the outgoing track at Long Pine.
Q. Do you know whether at that time there were any other kind of lubricator in use on defendant's engines on that division?

Mr. BROME: Defendant objects as incompetent, irrelevant and immaterial.
Objection overruled. Defendant excepts.

A. Yes sir, known as the Bull's Eye lubricator.
Q. About how long had they been put in use, these Bull's Eye lubricators, or been using them on that division?

Mr. BROME: Defendant objects as incompetent, irrelevant and immaterial.
Objection overruled. Defendant excepts.

A. Been using them between three and four years to the best of my knowledge, I don't exactly remember how long.
Q. Was there any particular engine that you had to run?

A. Yes sir, I run 284.

Q. Was it ever equipped with a Bull's Eye up to the time you were injured?

69 A. No sir.

Q. Were there other engines of that class equipped with it, do you know?

A. Yes sir.

Mr. BROME: Defendant objects as irrelevant and immaterial.

Objection overruled. Defendant excepts.

Q. And the Q's, what were they equipped with?

Mr. BROME: Defendant objects as incompetent, irrelevant and immaterial.

Objection overruled. Defendant excepts.

A. Some were equipped with the Bull's Eye and a few I think—that I don't know for sure, I hadn't run a Q for sometime.

Q. Well, from observation?

A. Some had the old style Nathan and some the Bull's Eye.

Q. Which were the larger engine, the Q. or R.

A. The R.

Q. What was the other class of engines in your division than the R.

A. Class R-1.

Q. What is the purpose of the lubricator?

A. The purpose of the lubricator is to convey oil from the lubricator to the cylinder through a pipe from the lubricator to the cylinder by the gravity system.

Q. What is the oil used for?

A. The oil is to keep the valves and cylinder from cutting.

Q. And if the oil didn't pass through the lubricator what would happen to the valves and cylinder?

A. The valves won't work and the engine won't go.

70 Q. Is it necessary to use these lubricators?

A. Yes sir, you can't run without it unless you have some oiling device: we used to oil by hand before we got the lubricators.

Q. That was back twenty years ago, I suppose?

A. Yes, thirty years ago. They must have oil or they won't work.

Q. These old style Nathan lubricators, how were they made?

A. The old style Nathan lubricators?

Q. Yes?

A. They are about that high (indicating) and about that large around, and got what we call two sight feeds, and they stand up and down.

Q. Two glasses?

A. Yes.

Q. Not one but two.

A. Yes: three on the lubricator, one for each cylinder and one for the air pump: got three altogether.

Q. How does these glasses stand?

A. The cylinder glasses stand up and down in this direction (indicating up and down).

Q. Are they hollow or solid?

A. Hollow.

Q. That is the old style.

A. Yes sir.

Q. Have you brought with you one of these old style lubricator glasses?

A. Yes sir.

Q. Is this one of them which I now hand you, which the reporter has identified as Plaintiff's Exhibit "A"?

71 A. Yes sir.

Q. Is that the kind of lubricator that was in use on this R. engine the night you were injured?

A. Yes sir, that kind of glass.

Q. Is there any shield around them to protect them in any way from being struck by anything?

A. Yes sir.

Q. What is it?

A. It is a shield of metal substance.

Q. Have you brought one of these with you?

A. Yes sir.

Q. Is the shield which I now hand you, marked Exhibit "B", one of the kind that is used around these Nathan lubricators?

A. Yes sir, that is a shield cover for the Nathan lubricator.

Q. Is that the kind of shield that was around the glass of the lubricator that exploded with you?

A. Yes sir. It opens that way, (indicating).

Q. Where does the oil pass with reference to this glass, Exhibit "A"?

A. The oil drops from up here (indicating) about twenty drops a minute and goes right through here and out at this point.

Q. And how can you tell whether the oil is working right?

A. We look right through here, there is about that much of it exposed: there is a couple of glands, metal glands that goes around and shields the glass in that condition (indicating).

Q. So you can see if the oil is working.

A. Yes sir, we look through here to see the oil go, which is necessary.

Q. Now, what pressure do these glasses withstand?

A. Boiler pressure.

72 Q. The same as the boiler?

A. The same as the boiler.

Q. What was your belief that night as to the pressure this glass would withstand?

Mr. BROME: Defendant objects as incompetent, irrelevant and immaterial, calling for a conclusion of the witness and not a statement of fact.

Objection overruled. Defendant excepts.

A. I believed she was strong enough to stand the pressure, the boiler pressure of the engine.

Q. The same as the boiler?

A. Same as the boiler.

Q. During your experience as an engineer, did any of these glasses on these Nathan lubricators break with you?

A. Yes, I have had them break.

Q. How many?

A. I couldn't say exactly, I remember of three during my running experience.

Q. During a period of twenty-five years?

A. Yes sir.

Q. Did you personally think there was any danger of being injured from this by an explosion of this glass?

Mr. BROME: Defendant objects as calling for a conclusion of the witness and not a statement of any fact material to the issues in this case.

Objection overruled. Defendant excepts.

73 A. No sir, I did not or I wouldn't have been there.

Q. Is there any signs when there might be some danger of this glass breaking?

Mr. BROME: Defendant objects as calling for a conclusion of the witness and not a statement of any fact.

Objection overruled. Defendant excepts.

A. Yes sir.

Q. Based on your own experience of twenty-five years as an engineer, what times, if any, during the use of these glasses in these lubricators, is there any danger of their breaking, as far as you know?

A. The danger is when the glass is first put in, after one is broken and another one replaced, in turning the steam on, until it is properly tempered to the heat: they would very often break.

Q. And you had to be careful then?

A. We had to be careful, and we used to watch them that they didn't break at that time.

Q. Outside of the time when you would be getting them tempered to the heat, what other times, as far as your experience goes, was there any danger of these glasses in these lubricators breaking?

A. Well, after they had been in, probably six or seven weeks sometimes they wear a little thin and would break.

Q. Would you have any warning of the fact that they were getting thin?

A. To a certain extent, yes sir.

Q. In what way?

A. The glasses wear thin by the steam and water pressure going through, and they will show dampness or a little water around the glass.

74 Q. Where would they wear a little thin and the steam have some effect on them?

A. Well they generally wear around what we call the gasket or gland near the end.

Q. Where it is soldered to the metal or something?

A. Well, yes.

Q. Not in the part that is open?

A. Not in the part open, no sir.

Q. When that would happen that you found the glass was getting thin, usually in your experience with the company, what would you do?

A. When we were at a division point it was the rule to report it and we would get one replaced, and if we were on the road so we couldn't do it, we would replace them ourselves.

Q. How long before you received this injury do you know of one breaking on your engine?

A. Well, the glass on the same side in the same lubricator broke about three weeks before this time.

Q. And how long before that time had you had any of these lubricators break?

A. I couldn't just remember, but I remember it was about seven years ago, for I remember the engine I was running.

Q. So, until about three weeks before this, it had been seven years since you had any of these glasses break on the engine that you were running?

Mr. BROME: Defendant objects as leading.

Mr. HARRINGTON: Question withdrawn.

Q. Now, at the time the glass broke seven years before you were injured, were any of these Bull's Eye lubricators in use?

A. No sir, I had never seen one at least.

75 Q. After the glass broke, some three weeks before you were injured, who put the glass in?

A. The machinist at Chadron.

Q. Who furnished the glass?

A. Well, it was furnished by the machinist or the night foreman.

Q. Well, who owned it.

A. Well the North Western.

Q. The defendant company.

A. Yes.

Q. Did that cause any delay, the breaking of that glass?

A. Yes sir, it caused some delay, probably twelve to eighteen or twenty minutes, I don't just remember.

Q. Do these delays have to be reported?

A. Yes sir we have to report to the company the cause of the delay.

Q. Did you report it?

A. Yes, sir, I did.

Q. Who was the foreman that had charge of putting in these Bull's Eye lubricators there?

A. I don't understand the question, you mean at Chadron?

Q. Yes?

A. Why, Geo. Harner, the round house foreman.

Q. When this lubricator broke with you, not seven years ago but the last time three weeks before you were injured, did you have any talk with the foreman as to the kind of a lubricator to put on that engine?

76 Mr. BROME: Defendant objects as incompetent irrelevant and immaterial, there is no issue in this case of any promise to put any other kind of lubricator on this engine that I have observed in the pleadings.

Objection overruled. Defendant excepts.

A. Yes sir.

Thereupon court adjourns until 1:30 for dinner.
At 1.30 P. M. court convenes and trial proceeds.

WILLIAM BOWER, the plaintiff, again takes the stand and his examination in chief is resumed.

By Mr. HARRINGTON:

Q. Was the engine steamed up at the time this glass exploded?
A. Yes sir.
Q. How long was it, about, until the train was due in there?
A. It was about thirty-five minutes.
Q. How much?
A. Due out of there in 35 minutes, that would be about—well it was 11:05 and they are due out at 11.40. they come in ten or twelve minutes before leaving time.
Q. Up to the time you received this injury and losing your one eye, had you ever heard of any one being actually injured by the explosion of one of these glasses?
A. No sir.
Q. Now, do you know what the Bull's Eye lubricator is?
A. Yes sir.

77 Q. And how long had they been using these on the road that you know of?

Mr. BROME: Defendant objects as incompetent, irrelevant and immaterial.

Objection overruled.
Defendant excepts.

A. In my best judgment between three and four years.
Q. And what class of engines did they begin useing them on, do you know?

Mr. BROME: Defendant objects as incompetent, irrelevant and immaterial and not relating to any issue presented by the pleadings.

Objection overruled.
Defendant excepts.

A. I do not.
Q. What class.

Mr. BROME: Defendant objects as incompetent, irrelevant and immaterial and not relating to any issue presented by the pleadings.
Objection overruled.
Defendant excepts.

A. The class carrying the high pressure steam, Q's and R's.
Q. What pressure do they carry?

Mr. BROME: Defendant objects as incompetent, irrelevant and immaterial and not relating to any issue presented by the pleadings.
Objection overruled.
Defendant excepts.

A. 190 pounds.
78 Q. Before that, when they were using the old style lubricators, the Nathan I believe you call them, what was the steam pressure on the boilers that you were using them on?

Mr. BROME: Defendant objects as incompetent, irrelevant and immaterial and not relating to any issue presented by the pleadings.
Objection overruled.
Defendant excepts.

A. 140 to 145 pounds.
Q. I don't know whether I asked you or not? What did you believe as to the pressure that the glass in this Nathan lubricator was capable of withstanding the night you were injured?

Mr. BROME: Defendant objects as incompetent, irrelevant and immaterial, calling for a conclusion and not a statement of fact.
Objection overruled.
Defendant excepts.

A. I thought they would stand the boiler pressure.
Q. That is the 190 pounds?
A. Yes, 190 pounds.
Q. Now, how long had you been running a passenger engine for the defendant company?
A. Well I had been running a passenger, more or less, for fifteen years.
Q. Were you running more than one train at the time you were injured?
A. Yes sir.
Q. What numbers?
A. Numbers three and six.
79 Q. What direction did your number six run?
A. It run from the west, running east.
Q. These were what they call the through trains?
A. Yes sir.
Q. How long had you been one of the regular engineers hauling trains three and six for the defendant?
A. About three years.
Q. During that period how much per month had you been paid as wages?

A. $157.00.
Q. Per month?
A. Yes sir.
Q. Before that, what wages were you paid by the defendant?
A. I don't understand the question. On a freight engine?
Q. No, on the passenger.
A. On the passenger?
Q. Yes.
A. Well, I got whatever the run paid that I was on: there would be different runs, some were 196, some 157 and possible some 145. Whatever the schedule paid on the different runs.
Q. When you first began to run the passengers, numbers three and six, $157, was the regular wages?
A. Yes sir.
Q. Was there any arrangement with the defendant for any change in the compensation?
A. Yes sir.
Q. What was it?

Mr. BROME: Defendant objects as incompetent, irrelevant and immaterial.
Objection overruled.
Defendant excepts.

80 A. Why, it was a raise in wages on the run which made $175. a month.
Q. When was that increase in wages to go into effect?

Mr. BROME: Defendant objects as incompetent, irrelevant and immaterial.
Objection overruled.
Defendant excepts.

A. The first of January 1911.
Q. And if you hadn't been injured, what would you have earned in the company's service since the first of last January per month?

Mr. BROME: Defendant objects as incompetent, irrelevant and immaterial.
Objection overruled.
Defendant excepts.

A. $175. per month.
Q. And what were the injuries you sustained by the explosion of the glass in the lubricator?
A. Well I lost my left eye entirely, and it left me a nervous wreck for that matter.
Q. Well, you lost your eye.
A. Yes sir.
Q. Which eye?
A. The left one.
Q. What effect has it had upon your nervous system?

Mr. BROME: Defendant objects as incompetent, irrelevant and immaterial and not within the issues.

Objection overruled.
Defendant excepts.

A. Well it left me very nervous.
Q. What was your nervous system before you sustained this injury?

81 Mr. BROME: Defendant objects as incompetent, irrelevant and immaterial and not within the issues.
Objection overruled.
Defendant excepts.

A. I wasn't nervous at all, I was all right before.
Q. What had been the condition of your health the twenty-five years you were working for the defendant, before you were injured?
A. There never was a more healthy man, never was sick a day in my life.
Q. Did you ever lay off for sickness?
A. No sir.
Q. Or anything else?
A. I have laid off since then.
Q. I say before you were injured have you been laid off?
A. No.
Q. What has been the condition of your health since you sustained this injury?
A. Well, sir, I have been very nervous.
Q. What was your condition as to sleeping before you were injured?
A. I could sleep any old time I laid down.
Q. And how about your sleep since your injury?
A. Well, sir, I am very nervous, I don't sleep good at all.
Q. Did you have any physician or surgeon attend the eye for you?
A. Yes sir.
Q. Who was it?
A. The first one was Mr. Lawson of Long Pine and then Mr. Gifford at Omaha and Dr. Elmore of Chadron.
Q. Where did you go for treatment.
A. Omaha.

82 Q. What place?
A. Mr. Gifford's office.

Q. Where were you operated on?
A. In Mr. Gifford's office, well, no, I was operated on in the new Clarkson hospital.
Q. In Omaha?
A. Yes sir.
Q. How long were you confined to the hospital?
A. Twenty-two or twenty-three days.
Q. And what was the condition of your health then?
A. I suffered all that a man could suffer I think having that eye taken out, very nervous.

Q. Mr. Bower, since you lost this eye sight, what can you do as to running a locomotive engine?

A. Well, sir, I couldn't run one at all, couldn't see good enough.

Q. You are out of business as an engineer.

A. Yes sir.

Q. What other line of business do you know to take up or follow?

A. I don't know any.

Q. Have you ever done anything since you were a boy except railroading?

A. No sir.

Q. Now, you told us about this old style lubricator. Kindly tell the jury what this new kind is?

A. Bull's Eye?

Q. Yes.

83 Mr. BROME: Defendant objects as incompetent, irrelevant and immaterial and not within the issues presented by the pleadings.

Objection overruled.

Defendant excepts.

A. It is a lubricator made lengthways, that is, it is long, lays the other way on the boiler instead of up and down, and it is a different style of glass, the glass is probably that thick (indicating) that we look through to see if the oil works, and it is put in with glands that fits around so as it is impossible for it to blow out.

Q. Why is it necessary to use glass at all in these lubricators——

A. Because we have to see that the oil is going to the valves or we would cut the valves and also break down the machinery, the engine won't work without oil.

Q. And except for seeing that the oil is going to the machine it could be made of metal?

A. Yes sir.

Q. If it was made of metal you couldn't see that the oil was going through the valve to the cylinders?

A. We couldn't tell if it was going at all.

Q. You could tell after a while it wasn't going to the cylinder I suppose?

A. Yes, after it got dry and it would be too late.

Q. Have you brought with you a glass that is used in the latest kind of lubricators?

84 A. Yes sir.

Q. Is this what they call a Bull's Eye lubricator that I now hand you, marked Plaintiff's Exhibit "C"?

A. Yes sir.

Q. One like the defendant has been using the last few years?

Mr. BROME: Defendant objects as incompetent, irrelevant and immaterial and not within the issues presented by the pleadings.

Objection overruled.

Defendant excepts.

A. Yes sir.

Q. How is that fastened into the balance of the lubricator?

Mr. BROME: Defendant objects as incompetent, irrelevant and immaterial and not within the issues presented by the pleadings.

Objection overruled.

Defendant excepts.

A. It goes in the lubricator that way (indicating) with a gla-d that screws or fastens around this part of the glass, this thick part there, so when you look through it you look through this glass this way (indicating).

Q. You are looking through this thickness that is an inch or more thick.

A. Yes sir.

Q. And can you see the oil being fed?

A. Yes sir.

Q. As well as through the others, the Nathan?

A. Yes sir, better.

Q. Better.

A. Yes sir.

Q. In your expereince as an engineer have you, on some
85 of the engines, personally used some lubricators like this Exhibit "C"——

A. Yes sir.

Q. You may state what your expereince has been in using this thick glass as to whether they break or not?

Mr. BROME: Defendant objects as incompetent, irrelevant and immaterial and not within the issues.

Objection overruled.

Defendant excepts.

A. I never saw one break or heard of it.

Q. Now, in so far as protecting against breaking as I understand it, the only difference in these two lubricators is the difference between the strength of one of these round glasses and the strength of this Bull's Eye?

A. As far as breaking is concerned, yes sir.

Q. I suppose they are fastened in differently?

A. Yes, sir, they go on altogether different.

Mr. HARRINGTON: Plaintiff now offers in evidence Plaintiff's Exhibit "A", being the glass from a Nathan lubricator.

Mr. BROME: Defendant objects as incompetent, irrelevant and immaterial and not within any issue presented in this case.

Objection overruled and same is allowed in evidence and exhibited to the jury.

Defendant excepts.

86 Mr. HARRINGTON: Plaintiff now offers in evidence Plaintiff's Exhibit "B" being the metal shield for Exhibit A.

Mr. BROME: Defendant objects as incompetent, irrelevant and immaterial and not within any of the issues presented in this case.

Objection overruled, same is allowed in evidence and exhibited to the jury. Defendant excepts.

Mr. HARRINGTON: Plaintiff now offers in evidence Plaintiff's Exhibit "B" being the Bull's Eye lubricator.

Mr. BROME: Defendant objects as incompetent, irrelevant and immaterial and not within any of the issues presented in this case.

Objection overruled, same is allowed in evidence and exhibited to the jury. Defendant excepts.

By Mr. HARRINGTON:

Q. I believe you said you knew they were using some of these on the larger engines—this new lubricator?

A. Yes sir.

Q. As far as you personally know from your own observation, what was your belief as to why they were using them?

Mr. BROME: Defendant objects as incompetent, irrelevant and immaterial.

Objection overruled. Defendant excepts.

A. The reason that they were using them was because there was no breaking of glasses or causing delays to the trains where a lubricator of that kind is on the engine.

87 Q. Saves delays?

A. Yes sir.

Q. When you injured yourself did you know there was any danger of sustaining any injury from this class of lubricators?

A. No sir.

Q. What was the condition of the weather the night you were injured?

A. Well, it was a day something like the present day, wasn't very cold, probably a little wind blowing but very little.

Q. Was the shell on or off the lubricator at the time it broke?

A. It was on when she exploded.

Q. Was there anything that you know of to make that lubricator safer than it was?

A. No sir.

Q. What position were you in at the time you sustained the injury?

A. I was in a healthy strong condition.

Q. What work were you doing, where were you standing?

A. I was standing up near the lubricator.

Q. What were you doing?

A. I had filled the lubricator shortly before that and had opened up the lubricator and was waiting for the steam to condense so the lubricator would work and was opening the feed to the air pump, what we call the sight feed, so the air pump would get oil so it would work.

Q. Was that part of your duties there that night?

A. Yes sir, my duty every night.

88 Cross-examination by Mr. BROME:

Q. How old are you Mr. Bower?
A. Fifty-four.
Q. And when did you commence work upon an engine.
A. On the 5th of March—no, not on an engine the 5th of March, I commenced with the company on the 5th of March, and I went on an engine soon after that, can't give the exact date.
Q. Well, you commenced what year?
A. '85.
Q. That was 26 years ago or about 26 years ago.
A. Yes sir.
Q. At that time you were about twenty-eight years old?
A. Twenty-eight or twenty-nine, yes.
Q. What occupation had you followed up to that time, Mr. Bower?
A. Well, I was raised on a farm when a boy, and then I had been in the stock business to a certain extent.
Q. You began as a fireman, didn't you?
A. Yes sir.
Q. And continued as a fireman how long?
A. Until the 2nd of December '87.
Q. Now, at the time you began working, did the engines that you worked on have a lubricator on it?
A. No sir, it did not.
Q. And when was the first time that you ever worked upon an engine that had a lubricator on it like the one represented by the glass, Exhibit "A" and the shield Exhibit "B"?
A. Well, sir, it was when we got the Queen engines, the Standard, I think in '86, I couldn't say positive.

89 Q. So the first engine you worked on didn't have any lubricator on at all?
A. No sir, didn't have any lubricator, the first engine.
Q. The oil was put in by hand?
A. Yes sir, we used to have to shut the engine off and had a cup we put the oil in and it would run in while the engine was silent.
Q. These lubricators are automatic, keep applying the oil all the time, do they not?
A. Yes sir.
Q. And the first one you saw used was on the engine you worked on in '86?
A. Well, it was when the Queen engines came I saw it.
Q. I mean this kind (indicating Exhibit "A").
A. I think it was '86.
Q. Now in '87 you began running an engine yourself.
A. Yes sir.
Q. And you ran an engine continuously from '87 up to the time of this injury?
A. Yes sir.
Q. And all that time for the North Western Railroad.
A. Yes sir.

Q. Did the first engine you began working on have a lubricator of this kind, I mean as engineer?

A. Well I don't remember that, she had a lubricator of some kind.

Q. Now it is a fact that most of the time for the twenty odd years, from the time you entered the service of the North Western as an engineer until this accident happened, you had been running an engine equipped with a lubricator of this kind?

90 A. Most of the time.

Q. Now, during the last three years you had been running on a passenger run between Long Pine and Chadron?

A. Yes sir.

Q. Now, what pressure engines had been pulling those trains during that three years?

A. Well, I think it was 190 pound pressure.

Q. And were those engines equipped with this kind of a lubricator?

A. Some were and some were not.

Q. How was it with the ones you run the last three years, some equipped with different kinds?

A. Yes sir.

Q. What ones did you run equipped with this kind?

A. 284 was one.

Q. How long had you been running engine 284 before this accident happened.

A. Probably two months.

Q. And had you ever run it before that?

A. No sir, never saw it before.

Q. And what engine had you been running before you run 284?

A. Well, sir, I run lots of them, I couldn't say as to the numbers, maybe twenty-five or thirty.

Q. Now, all those engines pulling those passenger trains were what you called heavy engines with 190 pounds pressure?

A. Well, there was some heavier than others.

Q. Well, they were all from 170 to 190 pounds?

A. Yes, they all carried 190 pounds pressure.

Q. And the most of them were equipped with this lubricator, were they not?

91 A. No sir, don't think they were.

Q. What do you think, half and half?

A. No sir, I think there were more of the other ones.

Q. You think there were more had Bull's Eye than this one?

A. Yes sir.

Q. You had been running this engine about two months?

A. I think about that, I don't just remember.

Q. Continuously?

A. Well, I run her for twenty nights out of the month and then for ten nights I didn't, another man run it.

Q. Well, can you tell what twenty nights you ran it in November?

A. Yes sir, I commenced the 10th and run her every night until the last of November.

Q. You were hurt on the 28th?

A. Yes sir.

Q. And was the same true for the month of October?

A. Same thing in October.

Q. Now this engine was equipped with this sort of lubricator during all that time?

A. Yes sir.

Q. And always had been so far as you know?

A. Yes sir.

Q. You had been acquainted with the use and operation of the lubricator on engines of that kind ever since you had been in the service of the North Western?

A. Yes sir.

Q. On the night this accident happened will you tell the jury where you first found the engine, where did you go to it?

A. At the round house at Long Pine.

Q. Yes sir, and what did you do after you got there?

92 A. I lit the head-light, oiled around the engine, oiled all the joints and such things, tapped the bell and backed the engine out of the round house and over to the turning table and on the outgoing track.

Q. But at that time had you inspected or done anything with this lubricator?

A. Not until I got it out.

Q. After you got it out did you do anything with respect to the lubricator?

A. Yes sir.

Q. Tell us what you did?

A. I drawed the condensed water out of the lubricator, which I have to do before I refill it with oil, every time a drop of water comes out a drop of oil comes in. I drew the water out, wiped off this (indicating) and filled the lubricator with what we call cylinder oil.

Q. You may examine the Defendant's Exhibit "1" and state whether or not you recognize that as a lubricator of the kind that was on that engine that night?

A. Yes sir, looks like the same kind of a lubricator.

Q. Now explain to this jury just what you done with the lubricator after you began to do something with it, before the explosion took place.

A. I shut off all these sight feeds.

Q. Those feed- that you refer to cuts the steam off so it doesn't go up through the glass?

A. Shuts it off so it don't go up through the glass, yes sir.

Q. Now, when you first got the engine that night and backed it out of the round house, those were open so the pressure of the steam was on the glass in the lubricator?

93 A. No sir, it wasn't on: I closed them in the morning when I arrived at Long Pine.

Q. So they hadn't been opened.

A. No.

Q. And when you backed the engine out of the round house they hadn't been opened.

A. No sir.

Q. When you got out, did you open it up the first thing?

A. No sir.

Q. What was the first thing you done?

A. See if they was closed and closed this one back here and also the one on the boiler (indicating on Exhibit "1").

Q. Now you had closed them in the morning?

A. Yes sir, I had closed this one and this one: this one we didn't close because it is the air pump and you can't leave the air pump without oil.

Q. With respect to the others to the back of the lubricator, did you close them in the morning or were they left open?

A. Well, sir, they were closed.

Q. They were closed in the morning.

A. I can't say whether I closed them in the morning or not, but I closed them in the afternoon.

Q. They were closed before steam was got up in the engine that night were they?

A. Yes sir.

Q. And they were in that condition when you backed the engine out and then out around on the track.

A. Yes sir.

Q. Now, after ascertaining they were closed, what did you do?

A. Closed this valve here and also the steam so there was no pressure on the lubricator at all.

94 Q. Was there any pressure on the lubricator except the pump before you closed that?

A. No sir.

Q. What next did you do?

A. In the afternoon I closed them I think, but I always see they are closed before I try to open them or I will scald myself.

Q. What else did you do?

A. I draw the water, this here fills with condensed water (indicating).

Q. Referring to Defendant's Exhibit "2," can you from that explain it any better? Do you recognize that as a duplicate of Exhibit "1" except it has been opened up?

A. This here part here holds the oil and also the glasses; when the lubricator is open and steam on these are filled with water and the part where the oil has to go out fills with water.

Q. That is, you mean the body of the lubricator itself is filled with oil and when the water goes out oil fills its place?

A. Yes sir.

Q. Go on.

A. I drew all the water out.

Q. So the lubricator was empty?

A. Yes sir.

Q. Then what was next?
A. After it was empty I wiped all these over.
Q. You wiped off the shields or glasses or both?
A. Well, both; wiped the glasses so I could see the oil.
Q. Then what did you do?
A. After doing that and drawing this oil, I took this plug out.
Q. The plug that opens the lubricator at the top?
A. Yes sir.
Q. And did you then fill it with oil?
A. Yes sir.
95 Q. Did you fill it entirely full?
A. No, we don't fill them quite full but very near; if you fill them full and the hot oil comes there ain't room for expansion.
Q. Oil takes more space when expanded by heat, does it?
A. Yes sir.
Q. When you fill that with oil does the oil show up in these glasses at all?
A. It does here.
Q. That is the glass that oils the pump?
A. No sir, this shows how much oil is in the lubricator. This one (indicating) is oil to the air pump and these side ones are for each valve and cylinder.
Q. When you fill this lubricator with oil does it appear and show up in these side glasses at all?
A. No sir, it does not; they are closed.
Q. And they were closed when you filled it, were they not?
A. Yes sir.
Q. What was the next thing you did after filling it with oil?
A. I opened this (indicating) very easily to warm the lubricator, the boiler throttle.
Q. What is that. A throttle that opens an avenue that conveys steam?
A. Yes sir, carriers the boiler pressure.
Q. You opened that slowly?
A. Yes sir.
Q. And what next did you do, did you finally get it entirely open?
A. I opened it a little and let it warm up first.
Q. And had you completed the opening of it before this explosion took place?
A. Yes sir.
96 Q. What, if anything had you done after opening up the valve to the boiler?
A. One more valve to open here after opening that other.
Q. What do you open that for?
A. To warm this lubricator.
Q. Maybe the jury understand you, I don't. Will the steam come in without opening these two valves?
A. No. The steam comes from the boiler over into this part, that

is the one I opened easily first, and then after that, after that is warmed some I broke the joint in this one.

Q. When you say you broke the joint, you opened the valve?

A. Yes sir, I opened this valve a trifle after it had been warmed here; we always do this when we open them; when we get them open (witness opens it) and after opening that, the lubricator now has the boiler pressure of the engine.

Q. Now what is this upper part here? The condenser?

A. Yes sir.

Q. What is the office of the condenser?

A. The steam condenses into water.

Q. The steam that goes into the condenser condenses into water there.

A. Yes sir, and drops down after the oil goes out.

Q. Now, after you got the valve allowing the steam to come into the condenser fully open, and the joint below fully open, then what did you do?

A. I opened the air pump; I was standing right about like this (indicating), and broke that to give oil to the air pump.

Q. Is that the time the explosion took place?

A. Not exactly, because I watched it drop two or three drops to see if it was dropping.

Q. Well is that when it exploded?

A. That lays up near the boiler and the throttle stands
97 about here (indicating) and I had the tallow I put in the torch I used to see on this throttle and I just took hold of the torch with one hand and the can with the other when this exploded and the shell here hit me in the eye.

Q. What I want to get at is, how much time elapsed, after you fully opened these two valves that let the steam into the lubricator, before the explosion took place?

A. Probably seven minutes.

Q. And during that seven minutes what were you doing?

A. Wiping the lubricator off and was talking with the fireman; he was sitting on the other seat.

Q. How much time had you occupied in this operation in respect to the lubricator in opening it and cleaning it and wiping it before tur-ing the steam in at all?

A. Oh, probably four to five minutes, don't just remember; sometimes if we haven't much time we do it quick, and sometimes we do it slow if we have plenty of time.

Q. How much time did you have that evening?

A. Oh, had all the time needed, thirty-five minutes.

Q. Now, you had been running that lubricator on that engine for two-thirds of the time for two months immediately prior to the accident, had you not?

A. Yes sir.

Q. Had you had a break during that time of a glass?

A. Yes sir.

Q. And when was it that you had the glass break?

A. About three weeks before.

Q. Where was that?
A. At Chadron.
Q. What glass broke?
98 A. This one here (indicating).
Q. Now, during all the years before that you had been running a good deal of the time, engines of high pressure, with lubricators of that kind?
A. No sir, not high pressure.
Q. During the three years, whenever you run an engine on trains three and six, it had high pressure, did it not?
A. Yes sir.
Q. And a number of engines were equipped, and you ran them, with that kind of a lubricator?
A. Some of them, yes sir.
Q. And prior to that time when you run a freight engine, didn't you run a high pressure engine on the freight?
A. Yes sir.
Q. Did you run an engine of high pressure on the freight equipped with that kind of a lubricator?
A. Well, I might have, but my regular engine had a Bull's Eye lubricator.
Q. Your regular engine on the freight?
A. Yes sir.
Q. But you had been running a passenger train for three years.
A. Yes sir.
Q. And you had no regular freight run except prior to that time?
A. Regular freight run prior to that time?
Q. Yes.
A. Well, up to that time.
Q. Up to the time you took the passenger train.
A. Yes.
Q. But you had the passenger run three years before this accident?
99 A. About three years.
Q. Now, this accident happened on the 28th day of November, 1910.
A. Yes sir.
Q. And you commenced running on the passenger when, in 1907? Can you tell the time of year that you changed from the freight and took a passenger run?
A. I took the run in the fall and I think it is three years, I am pretty sure it was three years; I took it sometime in the fall is all I remember about it; I took the run when a man by the name of Pritcher went away.
Q. The freight run that you had before you took the passenger run, how long had you run that engine?
A. Well I had several different engines in the years of service.
Q. You spoke of some engine, regular engine.
A. The regular engine that I had was 1324.
Q. What class was that?

A. She was a Q; they came new and was equipped with the Bull's Eye lubricator.

Q. Now they came when, the latter part of 1906?

A. Well I couldn't remember the year now, I have nothing to refresh my memory.

Q. I will ask you if it isn't true, that prior to the year 1906, the lubricators that you have got here (referring to Exhibits 1 and 2) wasn't the lubricators that was enclusively used on the North Western engines on this line?

A. Yes, I think so.

Q. And all the engines were equipped with just the kind of lubricators as Exhibit "1"?

A. Up until the time the Bull's Eye came.

100 Q. And that is true of high pressure and low pressure ones too isn't it?

A. Well, what high pressure engines we had here had those on before the Bull's Eye came.

Q. And you had the Q's, class Q had been used on the road or ten years, haven't they?

A. I don't think so that long up there, I guess they have in the East division.

Q. And equipped with this kind of a lubricator?

A. Well, I wasn't down there at that time but I suppose they was.

Q. Didn't those Q engines comes up on the west end frequently equipped with those kind of lubricators in the years 1902, 1903, 1904 and 1905?

A. I suppose they did.

Q. And didn't you see them frequently?

A. Yes, I seen them.

Q. And you run some of them, didn't you?

A. Without doubt I did.

Q. And what pressure did they carry?

A. They sure carried 190 pounds.

Q. So you don't mean to be understood, Mr. Bower, as saying to this jury, it wasn't customary and usual in the operation of this railroad to use this kind of lubricators on 190 pound pressure engines?

A. Well they did use them.

Q. And there was a time when they didn't use any other kind on those high pressure engines?

A. I think there was before they got the others.

101 Q. And from the time that these lubricators were discovered, away back in 1886, down to the time you got hurt, as an engineer you was familiar with their use and operation, were you not?

A. Yes sir.

Q. The manner of using and handling them; and you knew, did you not, if the temperature of the contents of the glass or the air on the outside changed suddenly, they were liable to break?

A. When they were first put in we guarded against that.

Q. How did you guard against that?

A. Well, sir, when the glass was first put in, if we put one in when

we turn the steam on, turn it very easily and was away from it altogether, turn out backs to it so if it broke it wouldn't hit us.

Q. That is true now when you were turning the steam in and changing the temperature especially if it was frosty weather, there was danger the glass would break?

A. No sir.

Q. And you turned it in slowly and kept away from it so if the glass did happen to break you wouldn't get hurt?

A. No sir.

Q. That wasn't the way?

A. No sir.

A. How?

A. When we put in a new glass or something of that kind.

Q. When you put in the glass.

A. Yes sir.

Q. Do you say to this jury there wasn't any danger of it breaking if you turn the steam in quickly in cold weather?

A. We don't turn it in quickly.

Q. I asked you if there was danger of it breaking if you did that?

102 A. Yes, sir.

Q. And you knew that?

A. Yes, sir.

Q. And there was danger of the glass breaking if the cold wind was blowing into the cab and you take this shield off quickly, don't you know that?

A. No, sir, I don't know any such thing.

Q. You don't know anything about that?

A. No, sir, I know it is not the fact.

Q. Now with respect to this one that broke, was the shield on at that time?

A. Yes, sir, it was.

Q. Now, Mr. Bower, can you think of anybody connected with the operating part of the railroad that would know more about that lubricator and the shield and the danger connected with the use of it on an engine, than an engineer that had been using it for 25 years?

A. No, I don't know as I do.

Q. And don't you think that at the time you got hurt, that you knew as much about this lubricator and as much about the danger of its use, as any man in the service of the North Western Railroad?

A. Well I thought—it was my understanding and I was always taught to believe that glass would stand the pressure of the boiler.

Q. And it is a fact that this glass had been standing the pressure of the boiler for three weeks?

A. Yes, sir, that is the fact.

Q. And you wouldn't like to say to this jury that you could point them to any other engineer or any other officer of the road who ought to have known any more about what danger there was connected with the use of the lubricator than yourself?

103 A. It was our of my line I wouldn't have to say that, tell the other engineers or officials what they knew.

Q. Now, Mr. Bower, as an engineer, it was your duty when you brought an engine in at the end of a run, if there was anything wrong with it or any defect or any dangerous appliances used on it, to report that fact in writing.

A. Yes, sir.

Q. Now, you never did report that the lubricator used on this engine No. 284 was defective or dangerous or wasn't the right kind of a lubricator to use, in any written report that you ever made, did you?

A. No, sir.

Q. You know the engine known as class R do you?

A. Yes, sir.

Q. Are they a high pressure engine?

A. Yes, sir.

Q. What steam do they carry?

A. 190 pounds.

Q. Don't some of them carry 200?

A. They shouldn't, I don't think, according to the bulletin.

Q. Have you got some class R-1 engines?

A. Yes, sir.

Q. What do they carry?

A. I never run one in my life.

Q. You don't know about them.

A. No, sir.

Q. Didn't you run a class R engine up in the Black Hill District in the year 1907, or at any other time?

A. In 1907?

Q. Yes.

A. No, sir, I never run a class R engine until about two months before I was hurt.

104 Q. Do you know whether they were in use on the Black Hills' Division in 1907?

A. No, sir, not that I know of.

Q. Do you say they were not?

A. Well, I couldn't answer for the company, they might run engines up there that I never saw.

Q. Can you tell this jury if you ever saw any engine of that class up there?

A. No, sir, I never saw one.

Q. Were you running on that division in 1907?

A. Yes, sir.

Q. Where from—well I think you told me in the fall of the year you took the passenger.

A. Well, if it was that year, I was running between Chadron and Cody, Nebraska.

Q. On the west end?

A. On the west end.

Redirect examination by Mr. HARRINGTON:

Q. If I understand you correct, you never ran an engine of the class R. until two months before your injury?
A. It was about that time, I couldn't just say, but about two months.
Q. And some seven years before the injury you had a glass break on the Q?
A. Yes, sir.
Q. That is one of the high pressure engines also?
A. Well she carried 190 pounds.

Q. Did you have anything to do about changing the en-
105 gines and putting different kinds of lubricators in them?
A. No, sir.

Q. Are you a mechinist?
A. No, sir.
Q. Did you have any personal knowledge of the strength of these lubricators?
A. Personal knowledge, no, sir.
Q. No. Did the company have another department different from yours that looks after the lubricators and appliances and machinery?
A. Yes, sir.
Q. And had you anything to do at all with furnishing these appliances?
A. No, sir.
Q. No decision to make *to make* as to the kind of lubricators to use?

Mr. BROME: Defendant objects as leading.
Mr. HARRINGTON: Question withdrawn.

Q. What did vou have to do in determining the kind of lubricator should be put in the engines.
A. We hadn't anything to say, only use what we was given to use.
Q. What department decides the kind of lubricators to be used?
A. The superintendent of the locomotive or the round house foreman.
Q. With that, you had nothing to do.
A. Nothing whatever, no, sir.
Q. And if changes were to be made in the machinery in any respect, what had you to do with that?
A. We hadn't anything to do with it. If we wanted something of that kind we would report it, if they saw fit to fix it they did, and if they didn't they didn't.

106 Q. Who determined when there should be any changes in the machinery?

Mr. BROME: Defendant objects as incompetent, irrelevant and immaterial.
Mr. HARRINGTON: Question withdrawn.

Q. What department of the company's service determined what kind of machinery should be used?

A. The motive power department.

Q. Were you employed by that department?

A. Well, I was to a certain extent. It was the officials of the motive power to say what will be put on the engine.

Q. In determining what kind of machinery should be put in use or changed, had you anything to do with that?

A. Not in the least, no, sir.

Recross-examination by Mr. BROME:

Q. Now, you told me a little while ago, if there was any unsafe or defective or dangerous connections in your engine when you came in off your run, it was your duty to report it?

A. Yes, sir.

Q. And of course when you say you had nothing to do with remedying the defects, you mean that that report went to the superintendent of the motive power department and the repairs, whatever they were, or the supplying of new appliances came by order from that department: all you did was to report.

A. All I done was to report, it went to the foreman.

Q. And you never did report in writing that these lubricators that you had been using for twenty-five years, were not the right kind or were used on too high pressure engines?

A. If I had I would have lost my job, they would have said I was interfereing with their business and discharged me.

107 Q. You never did make such a report?

A. No, sir.

Mr. BROME: The defendant moves to strike out that part of his former answer that if he had done that he wouldn't have any job.

Motion sustained. Plaintiff excepts.

Q. Now, isn't — true Mr. Bowers, that you, under your contract with the railroad company could only be fired for some failure or neglect of duty?

A. No, sir.

Q. And couldn't be fired for reporting some appliance was defective or out of order?

A. I have seen them fired for less than that.

Q. That isn't the question. The question is whether or not under your contract with the North Western Railroad if it isn't true that they could only fire you for good cause?

A. They would call that a good cause, interfering with their business.

Q. Well isn't it true that the Brotherhood of Locomotive Engineers through a grievance committee must be satisfied that your grievance is a good one?

A. Yes.

Q. So if you had reported these lubricators were dangerous and the North Western Railroad had undertook to deprive you of your employment on that account, you would have been entitled to a hearing before the grievance committee of the Brotherhood of Locomotive engineers, that is true, isn't it?

A. Well, I didn't think they was dangerous at all.
Q. You didn't think they were dangerous.
A. No.
Q. And that is why you didn't report them.
108 A. Yes, sir, I thought they would stand the pressure.

By Mr. HARRINGTON:

Q. Did you make a verbal request for a different kind of lubricator?

Mr. BROME: Defendant objects as incompetent, irrelevant and immaterial and improper re-direct.
Objection overruled. Defendant excepts.

A. Yes, sir, I did.
Q. Of whom?

Mr. BROME: Defendant objects as incompetent and improper re-direct examination.
Objection overruled. Defendant excepts.

A. Mr. Geo. Harner, round house foreman.
Q. And when was that?

Mr. BROME: Defendant objects as incompetent and improper re-direct examination.
Objection overruled. Defendant excepts.

A. That was about three weeks before I lost my eye.
Q. What did he say to you?

Mr. BROME: Defendant objects as incompetent, irrelevant and immaterial and hearsay.
Objection overruled. Defendant excepts.

A. I asked him for another lubricator.
109 Q. For what kind of a lubricator?
A. For a Bull's Eye lubricator. He said he didn't have one or he would give it to me.
Q. What else?
A. He said he expected some about the first of the month and he would put one on then.
Q. That would be the first of December.
A. Yes, that would be the first of December.

Mr. BROME: The defendant moves to strike out all this conversation between the witness and the round house foreman with respect to the lubricator as incompetent, irrelevant and immaterial, and not within the issues made by the pleadings in this case, not receivable under the issues plead either by the plaintiff or defendant, and as hearsay.
Motion overruled. Defendant excepts.

By Mr. BROME:

Q. You didn't think this lubricator was dangerous at all?
A. No, I didn't.

Q. And you didn't ask to have a Bull's Eye lubricator because this was dangerous?
A. No, that wasn't the idea.
Q. At the time you asked this foreman up there for the other kind of lubricator, was the time you had broken one three weeks before your injury?
A. Yes, sir.
110 Q. And you asked him for a Bull's Eye lubricator?
A. Yes sir.
Q. And he told you he didn't have one.
A. Yes sir.
Q. But they would get one about the first of December and put it on.
A. Yes sir.
Q. Now, the only reason you wanted that, was because it would save time out on the road in the event you broke down.
A. That was it exactly.
Q. You had no idea that was any safer than these?
A. No, I never thought these were dangerous.
Q. You didn't think there was any danger connected with these at all.
A. No, I wasn't afraid of it.

Witness excused.

Mrs. WILLIAM BOWER, being called and sworn as a witness in behalf of plaintiff, testified as follows:

Questioned by Mr. HARRINGTON:

Q. You are the wife of the plaintiff, William Bower?
A. Yes sir.
Q. And where is your home?
A. At present in Missouri Valley.
Q. You own your own home there?
A. Own my own home, yes sir.
Q. How long since you were married to Mr. Bower?
A. About thirty-three years.
Q. Have you any children as a result of the marriage?
111 A. Three children.
Q. Up to the time Mr. Bower was injured last November, did you know the condition of his health?
A. Why sure.
Q. What was the condition of his health during your married life?
A. Why he was a well man, healthy strong man.
Q. Did he have any sickness of any kind that you know of?
A. No sir.
Q. To what extent did he work?
A. He worked all the time when he was on duty of course.
Q. Days or nights.
A. Sometimes days, sometimes nights.

Q. What sort of appetite did he have.
A. Good.
Q. Have you had occasion to observe his appetite since his injury?
A. Yes, sir.
Q. How is it since that time?
A. Not as good as it was.
Q. Do you know how he slept before he received this injury?
A. Yes sir.
Q. Tell the jury how he slept.
A. Why, he slept well.
Q. Did you ever notice anything the matter with his nervous system before his injury?
A. No sir.
Q. What has been his conduct as to sleep and nervousness since his injury?
A. Too nervous to sleep lots of times.
112 Q. Were you with him at the Omaha hospital?
A. Yes sir.
Q. How did he spend the time there?
A. In terrible agony.
Q. And how long was he in the hospital.
A. Twenty-two days, I think or twenty-three.
Q. During all the time that you have known him, has he ever done anything but railroad?
A. Yes, since the time I have known him he has.
Q. Well since you was married, what was he doing when you were married?
A. He was farming.
Q. You were farming at the time you were married?
A. Yes sir.
Q. How long since he went to work for the railroad?
A. The year '85.
Q. About 26 years. Since that time has he done anything but railroad?
A. No sir.
Q. Has he any trade or occupation of any kind that he can follow, that you know of?
A. No sir.

Q. That's all.

Mr. BROME: No cross examination.

Witness excused.

Mr. BROME: I would like to ask Mr. Bower a question or two on cross examination.

113 Mr. BOWER being recalled for further cross examination, testified as follows:

Questioned by Mr. BROME:

Q. I don't know whether I understood you right or not: did you say during the 25 years you had been working for the company, you had never laid off for anything?

A. Yes, I might have been taken out of the service for a few days, but I never lost a month's pay.

Q. You might have been set down for a few days' pay.

A. Yes. What I meant, I never lost a month's pay or never was discharged.

Q. Now another thing: At the time you were hurt, were you contemplating quitting the service?

A. No sir, I was not.

Q. You hadn't been discussing that at all or talking about it?

A. No sir.

Q. Now you remember the statement made by you to Mr. Belden down at Omaha, do you not, after you got down there?

A. Well I might, yes, to a certain extent: I don't just remember, I was in a bad condition when Mr. Belden took that, I was in the hospital and very nervous and excitable, I didn't know what I was saying at that time.

Q. Now, did you say to Mr. Belden that your folks wanted you to quit sometime before, and that if you had only quit the day before you wouldn't have lost your eye.

A. I made some such statement. The boy said to me one time he wished I would quit, and I said to Mr. Belden if I had took the boy's advice I would have had two eyes instead of one.

114 Mr. HARRINGTON:

Q. Your son is a doctor at Chadron, is he not?

A. Yes sir.

Mr. BROME:

Q. Have you been discharged from the service of the company?

A. Not that I know of.

Q. You are still in the service.

A. For all I know.

Q. Still riding on transportation?

A. I have rode on transportation, not lately.

Q. You have got it yet?

A. Yes sir.

By Mr. HARRINGTON:

Q. You are not earning any money now?

A. No sir.

Q. And you never can run an engine again?

A. No sir.

Witness excused.

Mr. HARRINGTON: The Plaintiff Rests.

Mr. BROME: The defendant offers in evidence Defendant's Exhibits "1" and "2". (Being the lubricators used by the plaintiff Bower in his cross examination.)

No objections, same are admitted in evidence.

115 Mr. BROME: The defendant now offers in evidence the deposition of Mr. Houston, taken by Mr. Harrington for the plaintiff and not offered: I read his examination in chief:

No objections being interposed, same is admitted and is read in evidence as follows:

Mr. HOUSTON called on behalf of the plaintiff, testified as follows:

Examined by Mr. HARRINGTON:

Q. What is your name?
A. James Houston.
Q. Jave you any initials? Just James, is it?
A. Yes sir.
Q. What is your employment.
A. Engineer.
Q. By what company are you employed?
A. Chicago & North Western.
Q. Do you mean the Chicago & North Western Railway Company?
A. Yes sir.
Q. How long have you been employed by the Chicago & North Western Railway Company?
A. Twenty-two years.
Q. Where have you worked for that company as engineer?
A. Out of Chadron about the whole time nearly.
Q. Were you working for them the 28th day of November, 1910?
A. Yes sir.
Q. Were you at that time familiar with the lubricator and shield that they were using on the Chadron division of the railway company?
A. Yes sir.
Q. Please describe them.

116 Defendant objects as incompetent, irrelevant and immaterial, not relating to any issue presented by the pleadings.

Objection withdrawn.

A. You know what it is for. The lubricator has glass tubes in it so that you can see the oil feeding through: and this tube has a shield of perforated iron or steel that clamps around the glass and held with a spring. I belive that is about all the description there is.

Q. How long had that kind of lubricator and shields been in use on the defendant's railroad on the Chadron division?
A. Probably twenty years.
Q. Do you know what pressure these lubricators which had been in use for twenty years had been made to stand?

A. No, I do know what the pressure in the lubricator is, but I do not know what pressure they are made to stand.

Q. What was the pressure in the lubricators then?

A. 190 pounds.

Q. For how long a period had this pressure in the lubricators been 190 pounds on this division?

A. Always had been on that class of engines.

Q. But how long had that class of engines been in use on this division?

A. You mean the class of engines I was running at that time?

Q. Yes?

A. Why, probably three years.

Q. What was the pressure in the lubricators in the class of engines used before the road began using this last class you have mentioned?

A. Pressure different according to the boiler pressure in the different engines.

117 Q. Well, what was that boiler pressure prior to those in use these last three years you have mentioned?

A. From 120 to 170 pounds.

Q. When the company used these engines with the 190 pounds' pressure in place of engines having from 120 to 170 pounds' pressure, was there any change made in the kind of lubricators and shields used?

A. Yes, lubricators were made heavier but same kind only heavier——

Q. Do you know whether these lubricators that were in use on these larger engines were liable to explode or not?

A. I never heard of one exploding.

Q. Did you personally have any trouble with any of these lubricators?

A. Well, glass breaking frequently was all.

Q. Then in your own experience, the glass did break frequently, did they?

A. Yes sir.

Q. This lubricator made of glass?

A. No, brass.

Q. What purpose does the glass serve?

A. You can see through it and see the oil feed.

Q. Is this glass part of what you call the lubricator?

A. Yes sir.

Q. Did you know of any of the glass portion of this lubricator breaking on November 28th, 1910, on one of these engines?

A. Why, I heard of one breaking.

Q. Did you personally know of one breaking that night?

A. I had one break the morning of the 29th, 1910.

Q. What time in the morning.

Q. 12:30.

118 Q. What train were you using that engine on?

A. Train number six.

Q. State just what happened?

A. Glass exploded and I put in a new one.

Q. How long had that kind of glass in the lubricator been in use on the defendants' railroad at Chadron?

A. Why, it had been in use as long as the lubricators had been here.

Q. Do you know what pressure the glass in these lubricators in use at the time of this explosion were made to stand?

A. I believe twenty-five hundred pounds.

Q. What do you mean by twenty-five hundred pounds? Do you mean the glass was made to stand more pressure than the engine itself?

A. Yes sir.

Q. Do you know what caused the explosion and breaking of this glass in the lubricator?

A. Change in the temperature of the glass, sudden change.

Q. How frequently had you known the glass in this class of lubricators to explode within the last three years within your personal knowledge?

A. Very regular—sometimes glass lasted a year and then they put in sometimes four or five a day.

Q. Was there another class of lubricators in use on railroads, do you know, at that time, that were less liable to explode?

A. We had another class, I believe, stronger than that.

Q. Did you use this other class of lubricators yourself, Mr. Houston?

A. I have had engines with the other class on.

Q. What was the difference between these lubricators which
119 you mention as exploding so often, and these other lubricators which you have used at times?

A. The class that explode are tube glass; the others are flat glass.

Q. Do you know in what parts of its system the defendant railroad was using these lubricators with the flat glass in them in November, 1910?

A. I believe all over its system in places in different engines.

Q. Do you know from personal use of these, which was the stronger glass and less liable to explode?

A. The flat glass.

Q. In your experience as engineer for the defendant, have you ever had any of these flat glasses explode?

A. No.

Q. Mr. Houston, do you happen to have any booklet or book or circular put out by the defendant, telling of the respective matters of safety and danger in these different kinds of glass and their lubricators?

A. We have a circular.

Q. Could you let us have that circular?

A. It is not issued to each engineer—it is hung in the round house.

Q.

Cross-examination by H. C. BROME for defendant:

Q. What you term the explosion of the glass in the lubricators I understand you to say is caused by the change of temperature?
A. Yes sir.
Q. What do you mean by the temperature? The temperature of the air that surrounds it or the temperature of the oil?
120 A. The temperature of the water in it.
Q. There is water in the glass?
A. Yes sir.
Q. And a change in the temperature of this water causes the glass to break at times?
A. Yes sir.

Witness excused.

GEORGE L. HARNER, Being called and sworn as a witness in behalf of the defendant, testified as follows:

Questioned by Mr. BROME:

Q. Where do you live?
A. Chicago.
Q. Are you an employee of the North Western Railroad?
A. Yes sir.
Q. In what capacity?
A. Foreman of the round house.
Q. At what point?
A. Fortieth street.
Q. At Chicago.
A. Yes sir, Wisconsin division.
Q. Are you acquainted with the lubricator that has been offered in evidence here marked Defendant's Exhibit "1"?
A. Yes sir.
Q. You may state, if you know, whether or not those lubricators are in general use on the Chicago & North Western Railroad at the present time, upon engines that carry a pressure of 190 to 200 pounds?
A. Well, we have them on engines carrying 190 and we have them on engines carrying 200 pounds.
121 Q. And what was the fact as to whether or not they were in general use upon engines of that steam pressure in November, 1910?
A. Well I believe they were.
Q. Well were you employed at that time in the same capacity?
A. Yes sir.
Q. Now, with respect to the duties of an engineer, do you know what the duties of an engineer is, if there is anything dangerous or defective or any appliance out of order or insufficient on his engine?
A. We have a work book in which he is to make a written report of the defects of his engine.

Q. You may state whether or not the rules require all reports to be made in writing and not verbal?

A. Yes sir, they do.

Q. Do you know anything about the pressure that these glasses are subject to or manufactured for the purpose of withstanding before put in?

A. Well our information is from the manufacturer—500 pounds to the square inch.

Cross-examination by Mr. HARRINGTON:

Q. Of course you have no personal knowledge whether that is true or not?

A. No sir.

Q. And of course, if the boiler pressure is 190 and the glass breaks then the glass would be weaker than the boiler?

A. Yes sir, have to be weaker or subject to the temperature change.

Q. The weaker would break first.

A. Yes sir.

Q. If the glass was over 190—would stand over 190 pounds and the boiler was gauged for 190, then the boiler would burst before the glass would break: that is right, isn't it?

122 A. Yes.

Q. Sure. Now, then, the lubricator for twenty years or more has been a necessary appliance on locomotive engines?

A. Yes sir.

Q. During that period you have been increasing the size of the locomotives on the Chicago & North Western Railroad, have you not?

Mr. BROME: Defendant objects as improper cross-examination.

Mr. HARRINGTON: Question withdrawn.

Q. What is the last class of engines in use on the road, the largest class?

A. Class E.

Q. What pressure do they withstand?

A. Well, we have two pressures, they are superheated engines, that is out of Chicago now. Superheated engines and what we call saturated engines of the pressure of 185 to 210 pounds.

Q. What is the lubricator used on those engines?

A. Bull's Eye lubricator.

Q. How long has the Bull's Eye lubricator been used on that class of engines?

A. They came with them.

Q. How long has the company had that class of engines in their service?

A. Well, I think about September 1910 they got the first one.

Q. That is class E.

A. That is class E, a new type of engines.

Q. They are a new type of engine.

A. Yes.

Q. What was the last engine before the E came.
A. R-1 I guess, or the Z. Class Z a freight engine.
123 Q. How long have they had Z?
A. About the same length of time I think.
Q. And what kind of lubricators do they have?
A. Bull's Eye.
Q. Why don't you put the other one on them?

Mr. BROME: Defendant objects as incompetent and improper cross-examination.
Objection sustained. Plaintiff excepts.

Q. Now the next to them is R-1.
A. Yes sir.
Q. They have been in use a good many years, have they not?
A. Yes sir.
Q. How many years since they began using R-1 on the lines anywhere on the Chicago & North Western Railroad?
A. I can't tell.
Q. Well, as back as far as eight years?
A. I think so, I couldn't tell without looking it up.
Q. You think it is that long.
A. Yes.
Q. When they put on the R-1 what kind of lubricators did they have?
A. This Nathan lubricator.
Q. When did they first begin using the Bull's Eye lubricator?
A. To my knowledge about, I think pretty close to three years ago.
Q. Didn't they use them in 1906 at Chadron?
A. Well I wasn't — Chadron.
Q. You weren't.
A. No sir.
124 Q. Your own personal knowledge is about three years.
A. Yes, about three years, even less than that if anything.
Q. What kind or class of engines were they using them on?
A. On the Q engines when I first observed them.
Q. To what extent *at* the Bull's Eye lubricators used on the Q engines now.
A. Well I don't know.
Q. Well, are they using this old Nathan lubricator on many of the engines now?
A. There is, I think, probably twenty-five per cent.
Q. Of the engines that use the Nathan lubricator.
Q. About 25 per cent of all of them.
A. I think so. You understand that is a rough estimate, I have no means of knowing what other divisions might have.
Q. But in the division where you are at Chicago?
A. We are changing them, probably seventy-five per cent is changed.
Q. That have the Bull's Eye lubricator now.
A. Yes, 50 to 75 per cent.

Q. What per cent. had the Bull's Eye in November a year ago?
A. I wasn't there then.
Q. You don't know.
A. No sir.
Q. When you say there is about 25 per cent still using this old Nathan lubricator, that includes the big and little and all.
A. Yes sir.
Q. Switch engines and everything.
A. Switch engines, modern power, they have got Bull's Eye; they carry 185 pounds pressure.
125 Q. Even the switch engines have the Bull's Eye?
A. The new power all comes with Bull's Eye.
Q. It is recognized as the proper appliance now, is it not?
A. Yes sir.
Q. And has been for three or four years?
A. I think so.
Q. And this other class do explode—the Nathan?
A. Well, they have been known to explode.
Q. And hurt men?
A. Sure.
Q. And that is why you made the change. Isn't that the fact?
A. Not necessarily so. That is one of the facts.
Q. Another one is, the breaking of the old class lubricator would delay the trains at times?
A. Yes, that is another.
Q. Does the company manufacture these glasses themselves?
A. No sir.
Q. They just buy them.
A. They buy them.
Q. You are not buying any old class Nathan's now?
A. I don't know, I don't think they are.
Q. Not that you know of.
A. Not that I know of.

By Mr. BROME:

Q. All the new engines now are equipped with the new kind?
A. Yes sir, all our new modern power comes with Bull's Eye.
Q. That has been true for several years?
A. Yes sir, ever since the Q came.
Q. That was about three years ago?
126 A. I think so, I think the Q engines came three years ago. I don't know but I have the date (witness looks at memorandum book in his pocket). No, this book doesn't give the date.

Witness excused.

Mr. BROME: The Defendant rests.

Mr. HARRINGTON: The plaintiff asks leave to reopen his case and offer in evidence Carlisle's Table of expectancy.
By the COURT: The request is allowed.

Mr. HARRINGTON: The plaintiff is permitted to reopen his case and now offers in evidence from Maxwell's Practice in Justice Court, at Page 588, the following:

Carlisle's Table of Expectancy.

Age, 54 years. Prospectiveness of Life, 18 years 28/100.

Mr. HARRINGTON: Plaintiff -ests.

Testimony closed.

127 Mr. BROME: Comes now the defendant and moves the court that the jury be directed to return a verdict for the defendant for the reason that, all the evidence given and adduced upon the trial fails to show that the defendant is guilty of the acts of negligence charged in the petition: and from the evidence as adduced upon the trial, the truth of the avernment of negligence contained in the petition cannot be ascertained or declared by a reasonable juror.

(2) For the further reason that, the evidence shows without contradiction or dispute that this plaintiff was as well advised respecting the danger incident to the use of a lubricator of the kind in question upon locomotive engines as any other servant, agent or employee of defendant was or could be, and that whatever risk there was incident to the use and operation of said lubricator upon said engine was one of the ordinary risks incident to plaintiff's employment and assumed by him.

By the COURT: Motion overruled. Defendant excepts.

Mr. HARRINGTON: Plaintiff asks leave to amend his petition and makes the following motion:

The plaintiff requests permission to amend his petition in the third paragraph thereof by inserting before the word 'shield' the word 'glass', and to insert after the word 'steam' the words 'and were weak, unsafe, dangerous and liable to explode and break at any time when in use upon locomotive engines', and after the word 'engine' to insert the words 'the glass in', and after the word 'the' and before 'said lubricator' to insert the words 'glass in' and before the word 'aforesaid' to insert the words 'glass in the' and before the words 'said lubricator' the words 'the glass in' and after the words and before the word 'lubricator' to insert the words 'glass in', and to strike out the words 'and said spring' and after the word 'lubricator' to insert 'and the glass therein' and to strike out the words 'spring in shield', and after the word
128 'lubricator' to insert 'and the glass therein', and after the words '190 pounds' to insert 'and said glass was *was* weak, unsafe and dangerous and liable to explode at any time.'

Mr. BROME: The defendant objects to the amendment for the reason that, the proposed amendment changes the issues to be tried here and is not warranted by the testimony received without objection upon the trial; for the reason that, the petition as originally drawn and filed under which the defendant prepared for trial and has tried the case, limits the issue of negligence to the claim on the part of the plaintiff that the lubricator used at the time plaintiff was injured was too small for an engine of the size and carrying

the steam pressure of the one upon which it was located at the time plaintiff was injured: and there is no charge in the original petition that the lubricator itself as a lubricator was defective or liable to explode at any time when in use upon locomotive engines. That the proposed amendment presents a new issue, one not presented by the petition as originally drawn and one that the defendant made no preparation to defend against at this trial for the reason no such issue was presented. And for the further reason, all the evidence received that could possibly relate to the issue now presented, has been received over the objections and exceptions of this defendant at this trial.

By the COURT: The amendment is allowed with the right of the defendant to have time to meet the same if it so desires. Defendant excepts.

Thereupon, the attorneys for the defendant retired from the court room for consultation, and in a few minutes returned and announced to the court that they were ready to proceed with the case.

Case closed.

129 STATE OF NEBRASKA,
County of Holt, ss:

I, C. B. Scott, hereby certify, that the foregoing is a true and correct transcript of all the evidence, both oral and documentary, offered and introduced on the trial of the case of William Bower vs. Chicago & North Western Railway Company, tried in the District Court of Holt County, Nebraska, on the 19th day of December 1911, together with all objections interposed, the rulings thereon and exceptions taken thereto. I further certify that it is impracticable to attach to this record plaintiff's exhibits "A" "B" and "C" and likewise defendant's exhibits "1" and "2" offered in evidence and referred to in this record, for the reason that all of said exhibits are ponderous articles which do not admit of physical attachment to the record proper. I further certify that at the request of the defendant, Chicago & North Western Railway Company I have forwarded each and all of said exhibits to the Clerk of the Supreme Court at Lincoln, Nebraska, to be filed with the record in this case: that plaintiff's exhibit "A" is a cylindrical lubricator glass, and I have attached thereto my official certificate as follows: "In the District Court of Holt County, Nebraska. William Bower, plaintiff, vs. Chicago & North Western Railway Company, defendant. Plaintiff's Exhibit "A". C. B. Scott, court reporter Fifteenth Judicial District of Nebraska." The plaintiff's exhibit "B" is a metal lubricator shield, and I have attached thereto *to* my official certificate as follows: "In the District Court of Holt County, Nebraska. William Bower, plaintiff vs. Chicago & North Western Railway Company, defendant. Plaintiff's Exhibit "B". C. B. Scott, Court Reporter, Fifteenth Judicial District of Nebraska." That plaintiff's Exhibit "C" is a flat lubricator glass, and I have attached thereto my official cer-
130 tificate as follows: "In the District Court of Holt County, Nebraska. William Bower, plaintiff, vs. Chicago & North

Western Railway Company, defendant. Plaintiff's Exhibit "C." C. B. Scott, Court Reporter, Fifteenth Judicial District of Nebraska."

That defendant's Exhibit "1" is a locomotive lubricator and I have attached thereto my official certificate as follows: "In the District Court of Holt County, Nebraska. William Bower, plaintiff, vs. Chicago & North Western Railway Company, defendant. Defendant's Exhibit "1". C. B. Scott, Court Reporter, Fifteenth Judicial District of Nebraska." That defendant's Exhibit "2" is a sectional locomotive lubricator similar to defendant's Exhibit "1", except that exhibit "2" has been opened up so that the internal arrangement thereof is exposed to view and I have attached thereto my official certificate as follows: "In the District Court of Holt County, Nebraska. William Bower, plaintiff, vs. Chicago & North Western Railway Company, defendant. Defendant's Exhibit "2." C. B. Scott, Court Reporter, Fifteenth Judicial District of Nebraska."

Witness my hand this 22nd day of January, A. D. 1912.

C. B. SCOTT,
Court Reporter, 15th District.

Received The above and foregoing proposed Bill of Exceptions from defendant's attorney, this 5th day of February, 1912, for examination.

M. F. HARRINGTON,
Attorney for Plaintiff.

And Now on this 5th day of February, 1912, I herewith return the same with no objections or recommendations.

M. F. HARRINGTON,
Attorney for Plaintiff.

131 STATE OF NEBRASKA,
County of Sheridan, ss:

I, W. H. Westover, hereby certify that I was the presiding judge at the regular December A. D. 1911 Term of the District Court held in and for Holt County, in the Fifteenth Judicial District of Nebraska, and was present and presiding when the case of William Bower vs. Chicago & North Western Railway Company was tried at said *case*, and find that the same contains all the evidence, both oral and documentary, offered and introduced on the trial, excepting Plaintiff's Exhibits "A" "B" and "C" and Defendant's Exhibits "1" and "2". That Plaintiff's Exhibits "A" "B" and "C" and defendant's Exhibits "1" and "2" are ponderous articles which do not admit of physical attachment to the record proper, and are correctly described and properly identified in the certificate of C. B. Scott, official court reporter, attached to this bill of exceptions, and said exhibits are allowed as a part of this bill. That said record contains all the objections interposed, the rulings thereon and exceptions taken thereto.

And now on this day, the same having been presented to me by counsel for defendant for allowance and settlement, I therefore

hereby approve, sign, allow and settle the same as the Defendant's Bill of Exceptions in said case, and it is ordered, that the same be made a part of the record of said case in the Supreme Court when properly filed and certified to by the clerk of the District Court of Holt County.

Witness my hand this 14th day of February, A. D. 1912.

W. H. WESTOVER,
District Judge, Sixteenth Judicial District of Nebraska.

132 STATE OF NEBRASKA,
County of Holt, ss:

I, John A. Harmon, Clerk of the District Court of Holt County, Nebraska, hereby certify that the above and foregoing is the original bill of exceptions filed in my office on the 23d day of March, 1912, in the case of William Bower v. Chicago & North Western Railway Company. I further certify that plaintiff's exhibits "A" "B" and "C" and defendant's exhibits "1" and "2" are a part of this bill of exceptions, but it is impracticable to attach said exhibits to this bill of exceptions for the reason that all of said exhibits are ponderous articles which do not admit of physical attachment to the record and bill of exceptions proper. I further certify that said exhibits are correctly and properly identified and described in the official certificate of C. B. Scott, Official Court Reporter of the Fifteenth Judicial District of Nebraska in his certificate attached to this bill of exceptions, and each of said exhibits has attached thereto a certificate by the said C. B. Scott, Official Reporter, as certified by the said C. B. Scott in his certificate hereto attached, and has also attached thereto my official certificate as follows:

"Filed in my office on the 23d day of March, 1912, as a part of the bill of exceptions in the case of William Bower v. Chicago & North Western Railway Company, which said bill of exceptions was duly filed in my office on the 23d day of March, 1912. John A. Harmon, Clerk District Court Holt County, Nebraska."

And I hereby further certify that all of said exhibits were duly filed in my office as a part of said bill of exceptions on the 23d day of March, 1912, as shown by my certificates thereto attached.

Witness my hand and official seal this 17th day of April, A. D., 1912.

[SEAL.] JOHN. A. HARMON,
Clerk District Court Holt County, Nebraska.

133 Endorsed: 17574. Bower v. C. & N. W. R. Co. Bill of Exceptions. Supreme Court of Nebraska. Filed May 1, 1912. H. C. Lindsay, Clerk. #8392. Original Bill of Exceptions. Filed Mar. 23, 1912. John A. Harmon, Clerk of District Court, Holt County.

134 And on the same day there was filed in the office of the clerk of said supreme court a certain præcipe, in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

WILLIAM BOWER, Plaintiff and Appellee,
vs.
CHICAGO & NORTH WESTERN RAILWAY COMPANY, Defendant and Appellant.

Præcipe.

Comes now the above named defendant and appellant,, the Chicago & North Western Railway Company, and states to the court that this action is brought to the Supreme Court of the State of Nebraska by appeal from the District Court of Holt County, in the State of Nebraska, from a judgment rendered in said court on the 29th day of December, A. D. 1911; that the above named William Bower was plaintiff in said District Court of Holt County, Nebraska, and the Chicago & North Western Railway Company, the appellant herein, was the defendant in said court. The appellant the Chicago & North Western Railway Company further states to the court that the appeal is taken by the said Chicago & North Western Railway Company, which said Company is the appellant herein, as against William Bower, who is apellee herein.

B. H. DUNHAM &
HERMAN AYE,
Attorneys for Appellant.

Endorsed: 17574 Bower v. C. & N. W. R. Co. Præcipe. Supreme Court of Nebraska. Filed May 1, 1912. H. C. Lindsay, Clerk.

135 And afterwards to-wit on the 21st day of April, 1913, there was filed in the office of the Clerk of the Supreme Court of the state of Nebraska by the Chicago Northwestern Railway Company, Appellant its printed brief and argument on said appeal. And in said printed brief it made its assignment of errors in words and figures following to-wit:

136 *Assignment of Errors.*

The appellant complains of the trial verdict and judgment in the case for the following reasons:

1.

The court erred in overruling defendant's motion for an instructed verdict made at the close of all of the testimony.

2.

The court erred in refusing to give to the jury instruction No. 1 asked by the defendant.

3.

The court erred in giving to the jury instruction No. 1 requested by plaintiff.

4.

The court erred in giving to the jury instruction No. 2 requested by plaintiff.

5.

The court erred in giving to the jury instruction No. 3 requested by plaintiff.

6.

The court erred in giving to the jury instruction No. 4 requested by plaintiff.

7.

The court erred in giving to the jury instruction No. 4 given to the jury on the court's own motion.

8.

The court erred in giving to the jury instruction No. 5 given to the jury on the court's own motion.

9.

The court erred in giving to the jury instruction No. 7 given to the jury on the court's own motion.

137 10.

The court erred in overruling defendant's motion for a new trial.

11.

The court erred in entering judgment against the defendant.

Endorsed: In the Supreme Court of Nebraska. No. 17574. William Bower, Plaintiff and Appellee, vs. Chicago & North Western Railway Company, Defendant and Appellant. Brief and Argument of Appellant. M. F. Harrington, Attorney for Plaintiff and Appellee. A. A. McLaughlin, Edgar R. Hart, and Wymer Dressler, Attorneys for Defendant and Appellant. Supreme Court of Nebraska. Filed Apr. 21 1913. H. C. Lindsay, Clerk.

138 *Argued and Submitted.*

And afterwards, to-wit, on the 4th day of May, 1914, the following among other proceedings were had and done in said supreme court, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1914, May 4.

The following causes were argued by counsel and submitted to the Court:

* * * * * * *

No. 17574. Bower v. Chicago & N. W. R. Co., (re-submission.) Appeal from Holt County.

* * * * * * *

M. B. REESE,
Chief Justice.

139 And afterwards, to-wit, on the 23d day of June, there was rendered by said court and entered of record upon the journal thereof a certain Judgment, in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1914, June 23.

No. 17574.

WILLIAM BOWER, Appellee,
v.
CHICAGO & N. W. R. Co., Appellant.

Appeal from the District Court of Holt County.

This cause coming on to be heard upon appeal from the district court of Holt county, was argued by counsel and submitted to the court; upon due consideration whereof, the court doth find no error apparent in the record of the proceedings and judgment of said district court: it is, therefore, ordered and adjudged that said judgment of the district court be, and the same hereby is, affirmed, at the costs of appellant, taxed at $—, for all of which execution is hereby awarded, and that a mandate issue accordingly.

M. B. REESE,
Chief Justice.

140 And on the same day there was filed in the office of the clerk of said supreme court a certain Opinion by said court, pursuant to which the preceding judgment was entered, which opinion is in words and figures following, to-wit:

141 No. 17574.

BOWER
v.
CHICAGO & N. W. R. Co.

Opinion.

Filed June 23, 1914.

1. The courts of this state will take judicial notice of the fact that the "Black Hills" are in South Dakota, and of the further fact that the western terminus of the main line of the Chicago & Northwestern Railway Company, running from Omaha northwest through the city of Long Pine, Nebraska, is in the Black Hills, in the State of South Dakota.

2. And where the evidence shows that the western division of said railway company is known as the Black Hills division, the term "through trains," when applied by railroad men to trains in such division, will be construed to mean trains running through the division from one terminal point to the other.

3. Evidence examined and set out in the opinion, held, sufficient to show that at the time he was injured plaintiff was engaged in interstate business, and that his action was properly brought under the Federal Employers' Liability Act of April 22, 1908. 35 U. S. St. at Large, pt. 1, ch. 149, p. 65.

4. Evidence examined and set out in the opinion, held, sufficient to justify the submission of the question of defendant's negligence to the jury.

142 5. Record examined and held, not to contain any evidence to require the submission of the question of assumption of risk to the jury.

6. The instructions upon the question of contributory negligence examined, and held, not to contain any error of which defendant can complain.

7. In an action for personal injuries where the evidence establishes without contradiction that plaintiff's injuries are permanent, a clause in the charge to the jury, on the question of the measure of damages, that the jury if they find for the plaintiff may allow him for "Such prospective suffering and loss of health, if any, as the jury may believe from all the evidence before them in this case, he will sustain by reason of such injuries," is not error, nor in conflict with the rule of this court that in such cases it is the duty of the court to instruct the jury that only such damages as are reasonably certain to result therefrom can be compensated by their verdict.

8. Plaintiff was a locomotive engineer 54 years of age. For three years prior to his accident he had been earning $157 per month. Within less than two months after the time of his injury he
143 would have received a raise of salary to $175 per month. His injury resulted in the loss of an eye. Prior thereto he

had been a man of robust health. Held, that a verdict of the jury for $11,500, which is sustained by the trial court, cannot be held to be so excessive as to call for a reversal of the judgment, or to warrant a reduction by this court.

144 FAWCETT, *J.*:

Plaintiff was a locomotive engineer in the employ of defendant. On November 28, 1910, while engaged in filling the lubricator upon his engine, a glass attachment to the lubricator, which was surrounded by a metal shield, exploded and blew off the shield which struck plaintiff in the left eye, causing an injury which necessitated the removal of the eye, for which injury he obtained a judgment in the district court for Holt county. Defendant appeals.

Defendant complains that the court erred in refusing to instruct the jury that "under the pleadings and evidence in this case, plaintiff is not entitled to recover, and your verdict will be for the defendant." A number of reasons are urged in the argument why this instruction should have been given, one of which is that by his petition plaintiff based his right to recover upon the Federal Employers' Liability Act of April 22, 1908, and that there is no evidence in the record that plaintiff at the time he receved his injury was engaged in interstate commerce, nor any evidence to show that the train, to which he alleges his engine was about to be attached, was so engaged. While the evidence of the interstate character of trains "three" and "six" is not as clear and satisfactory as it could and should have been made, we think it was sufficient to take the case to the jury on that point. Plaintiff testified that he had been hauling trains three and six for about three years, "three" running west and "six" running east. "Q. These were what they call the through trains?
145 A. Yes, sir." The witness Mackey testified that he had been an engineer for defendant 20 years running on the "Black Hills Division;" that the headquarters for that division is Chadron. The witness Walford testified to the same facts. The witness Collins testified that he was a locomotive engineer in the employ of defendant. "Q. On what division? A. On what is called the Black Hills division, that is west of Long Pine. Q. Where is the headquarters of that division? A. Chadron." He testified further that he had been employed on the Black Hills division as an engineer for 21 years. We take judicial notice of the fact that the Black Hills are in South Dakota. We think we may also take judicial notice of the fact, well known to every citizen of even ordinary intelligence in the state of Nebraska, that the western terminus of defendant's road which runs through Long Pine is in the Black Hills. With these facts established, and the further fact established by the evidence that Long Pine is a division point on the Black Hills division, of which Chadron is the headquarters, the testimony of plaintiff that trains three and six were through trains meant that they were trains running through the Black Hills division, which would be from Long Pine to the Black Hills. Being such trains, they were interstate trains, engaged in interstate business, and plaintiff, when running his engine hauling one of those trains, or when upon his engine preparing it to

be attached to one of such trains for the purpose of hauling it, would be engaged in interstate business. We think the evidence
146 sufficiently shows that at the time he was injured he was preparing his engine to haul train No. three.

It is further urged that the court erred in overruling defendant's motion for an instructed verdict made at the close of all the testimony. The ground of this motion was that all of the evidence given upon the trial failed to establish the acts of negligence charged against defendant in the petition, and that the evidence shows without contradiction or dispute that whatever risk there was incident to the use and operation of the lubricator upon his engine was one of the ordinary risks incident to his employment and assumed by him. This is the most important point in the case. The evidence shows that attached to each locomotive engine is a lubricator and that as a part of such lubricator there is a glass attachment which is called by the witnesses "the lubricator." At the time of plaintiff's injury defendant was using two kinds of lubricators, one called the "Nathan" and the other the "Bull's Eye." The Nathan is a hollow tube, while the Bull's Eye is flat and solid. Plaintiff's engine was equipped with a "Nathan." Both lubricators were so connected with the boiler of the locomotive as to permit the steam pressure to force the oil through the lubricator and into the parts of the locomotive for which the same was intended. This was necessary because the engineer must be able to see at all times that the oil is dropping and that the lubricators are performing their functions. When in full use either lubricator was required to sustain the same steam pressure as the boiler. The Nathan lubricator had been in use
147 for over 20 years, and had been used on all of the engines of the defendant down to between two to four years before the time when plaintiff received his injury, when the Bull's Eye made its appearance. The evidence shows that the Nathan lubricator was liable to and did frequently break. The three conditions under which it was most liable to break were: (1) when it was first installed and before it had been thoroughly "tempered"; (2) when subjected to a sudden change of temperature; and (3) after it had been used for some time and had worn thin. Over each of the Nathan lubricators there was a metal shield, divided in the center by a spring which by a simple movement of the hand could be removed from the glass lubricator or replaced. This shield was evidently designed to serve a double purpose; (*a*) to prevent the glass from being broken if anything hard should strike it, and (*b*) to prevent injury to the engineer from flying parts of the glass when a break occurred. When one of these tubes would break it would be replaced by another, either by a man at the roundhouse or by the engineer himself if upon the road. This, according to the evidence, would occasion a delay to the train of from 12 to 20 minutes. The witnesses all agree that the Bull's Eye is unbreakable. That is to say, none of the witnesses, including a number of old engineers and the foreman of defendant's roundhouse in Chicago, had ever heard of one breaking. Whenever one of the Nathan tubes broke it was the duty of the engineer to report the fact to the proper official of the defendant. The evidence

shows that after the tube had been in use for some little time it would occasionally wear thin. When it became so worn the
148 fact could be detected by the engineer and it would then be his duty to call for a new tube. That plaintiff must have been a competent and careful engineer is shown by the fact that in 25 years' service as an engineer only three of these tubes had broken on engines being run by him; the one that caused his injury, one three weeks before that time, and the other seven years prior thereto. As a witness he was very frank and candid. He testified that he had never heard of anyone being injured by the breaking of one of the tubes: that he at all times believed that the tube was strong enough to withstand the same steam pressure as the boiler of his locomotive; that he never thought there was any danger in using the tube; that he had no fear of it. He was asked: "Q. Now, Mr. Bower, can you think of anybody connected with the operating part of the railroad that would know more about that lubricator and the shield and the danger connected with the use of it on an engine than an engineer that had been using it for 25 years? A. No, I don't know as I do. Q. And don't you think that at the time you got hurt, that you knew as much about this lubricator and as much about the danger of its use, as any man in the service of the Northwestern Railroad? A. Well I thought—it was my understanding and I was always taught to believe the glass would stand the pressure of the boiler. Q. And it is a fact that this glass had been standing the pressure of the boiler for three weeks? A. Yes sir, that is the fact." When Mr. Bower gave this testimony he gave it frankly, feeling that he in fact
149 did know as much about this lubricator and the shield and the danger incident to the use of it on an engine as anybody connected with the operating department of the railroad: but the testimony of defendant's foreman of its roundhouse in Chicago shows that in this Mr. Bower was mistaken. The witness Harner, called by the defendant, testified that he lives in Chicago, and is foreman of defendant's roundhouse at Fortieth street in that city. On cross-examination he testified:

"Q. When did they first begin using the Bull's Eye lubricator?

A. To my knowledge about, I think pretty close to three years ago.

Q. Didn't they use them in 1906 at Chadron?

A. Well, I wasn't (at) Chadron.

Q. You weren't?

A. No, sir.

Q. Your own personal knowledge is about three years?

A. Yes, about three years, or even less than that if anything.

Q. What kind or class of engines were they using them on?

A. On the Q engines when I first observed them.

Q. To what extent *at* (are) the Bull's Eye lubricators used on the engines now?

A. Well, I don't know.

Q. Well, are they using this old Nathan lubricator on many of the engines now?

A. There is, I think, probably twenty-five per cent.

Q. Of the engines that use the Nathan lubricator?
A. Yes.
Q. About 25 per cent of all of them?
A. I think so. You understand that is a rough estimate, I have no means of knowing what other divisions might have.
Q. But in the division where you are at Chicago?
A. We are changing them, probably seventy-five per cent is changed.
Q. That have the Bull's Eye lubricator now?
A. Yes, 50 to 75 per cent.

* * * * * * *

150 Q. When you say there is about 25 per cent still using this old Nathan lubricator, that includes the big and little and all?
A. Yes, sir.
Q. Switch engines and everything?
A. Switch engines, modern power, they have got Bull's Eye; they carry 185 pounds pressure.
Q. Even the switch engines have the Bull's Eye?
A. The new power all comes with Bull's Eye.
Q. It is recognized as the proper appliance now, is it not?
A. Yes, sir.
Q. And has been for three or four years?
A. I think so.
Q. And this other class do explode—the Nathan?
A. Well, they have been known to explode.
Q. And hurt men?
A. Sure.
Q. And that is why you made the change. Isn't that the fact?
A. Not necessarily so. That is one of the facts.
Q. Another one is, the breaking of the old class lubricator would delay the trains at times?
A. Yes, that is another."

On redirect he testified:

"Q. All the new engines now are equipped with the new kind?
A. Yes, sir, all our new modern power comes with Bull's Eye.
Q. That has been true for several years?
A. Yes, sir, ever since the Q came.
Q. That was about three years ago?
A. I think so, I think the Q engines came three years ago."

This testimony by defendant's foreman established several important facts. It shows that the Bull's Eye is now recognized by the defendant as the proper appliance and has been for three or four years; that all of the new engines of the class plaintiff was operating, engines of 190 pounds pressure, now come equipped with the Bull's Eye; that since the Bull's Eye made its appearance defendant had been changing this device on its engines by substituting the
151 Bull's Eye for the old Nathan and had made such substitution on about 75 per cent of all of its engines, "big and little and all." A fair inference is that in making those changes they

would devote their attention more particularly to the high pressure engines, and if only 25 per cent of all of their engines "big and little and all" now have the old Nathan it is, we say, a fair inference that by far the larger portion of that 25 per cent would be low pressure engines. It also discloses an important fact not known to plaintiff when he said that he did not know of anyone connected with the defendant who would know more about the danger incident to the use of the old style Nathan than himself. It shows that the company knew that the old Nathan would explode and "hurt men." When the witness testifies that these old lubricators had been known to explode and was asked: "Q. And hurt men?" he answered "Sure." There is significance in the emphatic character of this answer. He further shows that that fact was one of their reasons for changing from the old Nathan to the Bull's Eye lubricator; the other fact being that the breaking of the old lubricators would delay the trains at times. It therefore appears that the defendant knew the old style lubricator, which it had been using for many years, was dangerous; that its employes who were using it were being injured by it; that there was another device in the market, which the defendant was using, that was absolutely safe, and yet it continued to permit plaintiff and other engineers in its service to use the dangerous device when it knew of and had in its
152 possession a safe one, which could easily and cheaply be substituted. This does not come within the rule that a master is not obliged to use the best known device. It presents the simple question whether a master may continue to use a dangerous appliance when it knows of and has at its command a perfectly safe one. This it cannot do. We therefore hold that the court did not err in submitting the question of defendant's negligence to the jury.

What we have above said disposes of the question of assumption of risk. The rule is now well established, not only in this state, but elsewhere, that a servant assumes only the dangers incident to his employment which are known to him or which, by the exercise of reasonable care, he would know. The evidence in the record before us does not bring plaintiff within that class. He had used this device for many years; had never been injured himself and had never heard of anyone else being injured. He "was always taught to believe" that the Nathan lubricator would withstand the same steam pressure as the boiler of any engine he had used. He had never heard of a break when the metal shield did not afford protection. Had he known what the defendant knew, viz.: that men were being hurt by the use of this device, and had been continued in the service without objection, there would be some foundation for a claim of assumption of risk. Complaint is made that the trial court by its instructions withdrew the question of assumption of risk from the jury. It is true that paragraph 4 of the instructions given by the court on its own motion failed to submit it, but it is also true
153 that in other paragraphs the point was covered. But even if not submitted at all, it would not be error for the reason that there is nothing in the evidence which would sustain a finding that plaintiff assumed the risk of danger in using this device.

On the question of contributory negligence, the court went farther in favor of defendant than it should have gone under the Federal Employers' Liability Act, as it gave the defendant the full benefit of its plea of contributory negligence.

A number of assignments are urged against the rulings of the court in the giving and refusal of instructions. We have examined them carefully and are unable to discover prejudicial error in any of them. The only one to which we deem it necessary to refer is instruction No. 4, requested by the plaintiff, which reads as follows: "If you find for the plaintiff you will allow him as damages such sum as will compensate him for the injuries he has sustained, not exceeding $31,750, which is the amount sued for. The elements entering into damages are as follows: (1) The value of his time during the period that he was disabled by the injuries. (2) If the injuries have impaired Mr. Bower's power to earn money in the future, such sum as will compensate him for such loss of power. (3) Such reasonable sum as the jury shall award him on account of any pain and anguish he has suffered by reason of his injuries. (4) Such prospective suffering and loss of health, if any, as the jury may believe from all the evidence before them in this case, he will sustain by
154 reason of such injuries. (5) Such sum as the jury may deem proper for the inconvenience of his going through life with only one eye." Subdivision 4 is the one complained of. Defendant cites Chicago, R. I. & P. R. Co. v. McDowell, 66 Neb. 170, and Nixon v. Omaha & C. B. St. R. Co., 79 Neb. 550, together with cases from other courts, to the point that it is the duty of the court in instructing the jury as to any future damages that only such as are "reasonably certain to result therefrom" can be compensated by their verdict. These authorities are eminently sound, but they do not fit the instruction under consideration. In the McDowell case the court instructed the jury that if they believed that plaintiff had suffered permanent injuries it was the duty of the jury to estimate, as well as it can be done, the damages which he had suffered since the time of the injury by reason thereof, as well as what "he may hereafter suffer, if any." In the Nixon case the instruction told the jury that in determining the damages they had a right to consider the testimony as to physical pain and suffering, if any, endured by the plaintiff, "or which she may endure in the future as a result of the injuries received at the time complained of." We reversed the judgments in both cases for the reason that permitting the jury to allow for such damages as the plaintiff "may hereafter suffer" is a departure from the rule of reasonable certainty and opens the door for unrestrained speculation. The instruction before us is not subject to this criticism. It did not tell the jury that they
155 might allow plaintiff for such suffering and loss of health in the future, as the plaintiff "may sustain" but it told the jury that they could allow for "Such prospective suffering and loss of health, if any, as the jury may believe from all the evidence before them in this case, he will sustain by reason of such injuries;" not that they may allow for such suffering as the jury "may believe" he

may sustain, but for such suffering as the jury may believe "from all the evidence before them in this case;" that is to say, for such suffering as the jury find from the evidence in the case he "will" sustain,—not such as he "may" sustain. The language of the instruction is positive, clear and explicit, that the jury must be governed by the evidence in the case before them and allow the plaintiff for such future suffering only as he will actually sustain by reason of his injuries. In Chicago & N. W. R. Co. v. De Clow, 124 Fed. 142, the circuit court of appeals for the Eighth Circuit held: "A charge that a plaintiff could recover compensation 'for any pain and suffering he may be called upon to undergo in the future—that is, in case you find that he will suffer pain and suffering in the future'—is not error, in the absence of any suggestion or request for a modification or explanation of the instruction before the jury retires." On page 145 Judge Sanborn in the opinion says: "If the instruction that the plaintiff was entitled to compensation 'for any pain and suffering he may be called upon to undergo in the future' stood alone, without qualification by any other part of the court's directions
156 to the jury, it would undoubtedly be erroneous. The authorities cited for the defendant go no farther. But this sentence did not stand alone. The court was evidently conscious of the inherent error in the unqualified statement it contained the moment it was uttered, and it instantly added: 'That is, in case you find that he will suffer pain and suffering in the future.' It is clear that the court made this qualification of its first statement for the express purpose of conforming its charge to the established rule. * * * The jury has found under this charge that the plaintiff will endure all the future suffering for which they have given him compensation. In order to reach the conclusion that the court was *quilty* of prejudicial error in this instruction, the presumption must be indulged that the jury has found that the plaintiff will endure future suffering that it was not reasonably certain from the evidence that he would sustain; that they have found that he will suffer what they were not reasonably certain that he would suffer. This presumption is too violent and irrational for us to raise. There is no such legal presumption. An appellate court cannot and ought not to create it, and there was no prejudicial error in this part of the charge."

It is further urged that the verdict is excessive, appearing to have been given under the influence of passion and prejudice. The verdict was for $11,500. Plaintiff was 54 years of age. For three years preceding his accident he has been earning $157 per month. On the 1st of January following the time of the injury—a period of a month and three days—plaintiff would have received a raise in salary to $175 per month. His expectancy of life, as shown
157 by the Carlisle tables, was 18.28 years; but his appearance upon the witness stand and his previous good health may have satisfied the jury that he might reasonably be expected to live a much longer period than that. The expectancy of life, as shown by the Carlisle table, is not conclusive upon the jury. It is simply evidence

which they have a right to take into consideration in arriving at their conclusion as to the probable expectancy of plaintiff's life. His injury was of so grave a character that he is forced to abandon the profession of his lifetime. He can no longer hold a position as engineer. He must go through life with one eye. During all that time he must suffer the disfigurement, discomfort and other handicaps thus forced upon him. The jury who saw him fixed the amount of his compensation. An experienced trial judge has refused to set aside their estimate. We must decline to go into a mathematical computation to determine with exact nicety just how much compensation should be paid to a man for such a terrible injury.

Finding no prejudicial error in the record, the judgment of the district court is

Affirmed.

158 And afterwards to-wit on the 25th day of July, 1914, the said Chicago — Northwestern Railway Company, Appellant, filed a motion for rehearing of said cause in the office of the Clerk of the Supreme Court of Nebraska, which said motion for reharing is in the words and figures, to-wit:

159 In the Supreme Court of the State of Nebraska.

No. 17574.

WILLIAM BOWER, Appellee,
vs.
CHICAGO & NORTH WESTERN RAILWAY COMPANY, Appellant.

Motion for Rehearing.

Appellant moves the court to set aside its opinion and order affirming the judgment entered by the District Court of Holt County, Nebraska, in the above entitled cause, and to grant a rehearing of said cause and urges as reasons therefor the following:

1.

The court erred in holding in its opinion that the facts in this case did not require the submission to the jury of the question of whether plaintiff assumed the risk of injury from the breaking of the lubricator glass involved in the accident complained of.

2.

The court erred in holding in its opinion filed in this cause that the evidence showed as a matter of law that plaintiff did not know and by the exercise of reasonable care would not know of the dangers to which he was subjected in operating the engine on which he was employed at the time of the accident, equipped with the lubricator complained of.

3.

In giving instruction No. 3 requested by the plaintiff, which advised the jury that the employe does not assume the risk of any injury sustained by reason of negligence of the employer in furnishing and maintaining safe appliances or machinery and that if defendant was negligent in furnishing the lubricator glass in
160 controversy, plaintiff would not assume the risk of injuries resulting from its use, the trial court erred, and this court should have so held in its opinion and should have for said reason reversed the case.

4.

The court erred in holding in its opinion in this case that the evidence was sufficient to warrant the jury in finding that defendant was negligent in using the lubricator complained of and in not having substituted a Bull's Eye lubricator for it.

5.

The court erred in said opinion in holding that a Bull's Eye lubricator "could easily and cheaply be substituted" for the lubricator complained of for the reason that there was no evidence in the record upon which such conclusion could be reached, nor was there any evidence in the record showing or tending to show whether a substitution would be easy or difficult nor whether same would be expensive or otherwise.

6.

The court erred in holding in said opinion that the evidence was sufficient to show as a matter of law that defendant was engaged in interstate commerce at the time of the accident complained of and that plaintiff was employed in such commerce.

7.

The court erred in holding in said opinion that the verdict of the jury was not excessive nor the result of passion and prejudice.

W. DRESSLER,
A. A. McLAUGHLIN,
Attorneys for Appellants.

Endorsed: In the Supreme Court of the State of Nebraska. No. 17574. William Bower, Appellee, vs. Chicago & North Western Railway Company, Appellant. Motion of appellant for rehearing. W. Dressler and A. A. McLaughlin, Attorneys for Appellant. Supreme Court of Nebraska. Filed Jul- 25, 1914. H. C. Lindsay, Clerk.

161 And afterwards, to-wit, on the 16th day of October, there was rendered by said supreme court and entered of record upon the journal thereof, a certain Order in the words and figures following, to-wit:

Supreme Court of Nebraska, September Term, A. D. 1914, Oct. 16.

No. 17574.

WILLIAM BOWER, Appellee,
v.
CHICAGO & N. W. R. Co., Appellant.

Appeal from the District Court of Holt County.

This cause coming on to be heard upon motion of appellant for a rehearing herein, was submitted to the court: upon due consideration whereof, the court doth find no probable error in the judgment of this court heretofore entered herein: it is, therefore, ordered and adjudged that said motion for rehearing be, and the same hereby is, overruled, and a rehearing herein denied.

M. B. REESE,
Chief Justice.

162 And afterwards to-wit on November 21st, 1914, there was filed in the office of the Clerk of the Supreme Court of Nebraska, by the said Chicago — Northwestern Railway Company, its assignment of errors with prayer for reversal which said original assignment of errors is attached hereto.

163 In the Supreme Court of Nebraska.

No. 17574.

CHICAGO & NORTH WESTERN RAILWAY COMPANY, Plaintiff in Error,
vs.
WILLIAM BOWER, Defendant in Error.

Assignments of Error.

Now comes the plaintiff in error, the Chicago & North Western Railway Company, and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Nebraska, in the above entitled cause *shows* manifest error in this, to-wit:

Assignment of Errors.

1.

The Supreme Court of the State of Nebraska erred in affirming the judgment of the District Court of Nebraska within and for the County of Holt.

2.

The Supreme Court of the State of Nebraska erred in holding and deciding that the evidence in said cause showed as a matter of law

that plaintiff in error was engaged in interstate commerce at the time of the accident complained of, and that defendant in error was employed at said time in such commerce.

3.

The Supreme Court of the State of Nebraska erred in holding and deciding that the evidence submitted on the trial of said cause was sufficient to require submission to the jury of the question of whether plaintiff in error was negligent in the respects charged in the petition of defendant in error.

4.

The Supreme Court erred in holding and deciding that the giving to the jury of instruction No. 3, requested by the defendant
164 in error, which advised the jury that a servant does not in any case assume the risk of the master's negligence in furnishing and maintaining appliances and machinery for the servant's use, was not reversible error.

5.

The Supreme Court of Nebraska erred in holding and deciding that the trial court did not commit reversible error in advising and instructing the jury in instruction No. 3, requested by defendant in error, that if plaintiff in error was negligent in furnishing lubricator, glass and spring in controversy, defendant in error would not assume the risk of injury resulting from their use.

6.

The Supreme Court of Nebraska erred in holding and deciding that the evidence introduced on the trial of said cause was insufficient to justify submitting to the jury the question of whether defendant in error assumed the risk of injury from the breaking of the lubricator glass complained of and because thereof if there was error in instructions on the question of assumed risk, such error was not prejudicial.

7.

The Supreme Court of Nebraska erred in holding and deciding that the evidence introduced on the trial of said cause showed as a matter of law that defendant in error did not know, and by the exercise of reasonable care could not know of the danger to which he was exposed in operating the locomotive upon which he was employed at the time of the accident complained of while same was equipped with the lubricator complained of.

165 Wherefore plaintiff in error prays that the judgment of the Supreme Court of the State of Nebraska be reversed and

that judgment be rendered herein in favor of plaintiff in error and for costs.

CHICAGO & NORTH WESTERN RAILWAY CO.,
Plaintiff in Error,
By LYLE HUBBARD,
W. DRESSLER,
A. A. McLAUGHLIN,
Its Attorneys.

[Endorsed:] Supreme Court of Nebraska. Filed Nov. 21, 1914. H. C. Lindsay, Clerk.

166 [Endorsed:] In the Supreme Court of Nebraska. No. 17574. Chicago & North Western Railway Company, Plaintiff in Error, vs. William Bower, Defendant in Error. Assignments of Error. Supreme Court of Nebraska. Filed Nov. 21, 1914. H. C. Lindsay, Clerk.

167 And on the said day, November 21, 1914, there was filed in the office of the Clerk of the Supreme Court of Nebraska by the said Chicago Northwestern Railway Company, its petition for the allowance of the writ of errors to the Supreme Court of the State of Nebraska for the removal of said record, judgment and proceedings in said action into the Supreme Court of the United States which said original petition for writ of errors is attached hereto.

168 In the Supreme Court of the State of Nebraska.

No. 17574.

CHICAGO & NORTH WESTERN RAILWAY COMPANY, Plaintiff in Error,
vs.
WILLIAM BOWER, Defendant in Error,

Petition for Writ of Error.

To the Honorable Manoah B. Reese, Chief Justice of the Supreme Court of the State of Nebraska:

Comes now the above named plaintiff in error, and complains that in the judgment, decision, record and proceedings in a certain cause pending in the Supreme Court of the State of Nebraska, in which the above named plaintiff in error was appellant, and William Bower was appellee, which cause was decided and determined in the said Supreme Court of the State of Nebraska, and judgment of affirmance therein rendered on June 23rd, 1914, and in which a motion for a re-hearing in said court was thereafter filed as provided by law, and overruled on the 16th day of October, 1914, at which time the said judgment of said court became final, which said Supreme Court of the State of Nebraska was the highest court of law

or equity in which a decision or judgment could be had in said action, and in which action and the judgment and decision therein there was drawn in question the construction and application of a Statute of the United States, to-wit: The Federal Employers' Liability Act of April 22, 1908, C. 149, 35 Stat. 65, as amended April 5th, 1910, C. 143, 36 Stat. 291.

In said action defendant in error claimed the right to recover from the plaintiff in error for a personal injury alleged to have been caused by the negligence of plaintiff in error, a common carrier by railroad, while engaged in interstate commerce, and while defendant in error was employed in such commerce as a servant of plaintiff in error, said claimed right to recover being based upon the said Federal Employers' Liability Act, and in which action plaintiff in error denied said claim of defendant in error, that he was
169 at the time of being injured employed in interstate commerce, and denied the alleged negligence complained of and alleged that the dangers, if any, due to the matters complained of were open and obvious and known to defendant in error, and that by entering and continuing in said employment he assumed all risk of injury therefrom, all of which claims and contentions of plaintiff in error were denied by the said Supreme Court of Nebraska. In said action plaintiff in error claimed a right, privilege and immunity under the said Federal Employers' Liability Act, and the decision of the said Supreme Court of the State of Nebraska was against the said right, privilege and immunity claimed by plaintiff in error, and plaintiff in error alleges that manifest error happened in said action, as appears from said judgment and decision and the record, and in the assignment of errors herewith presented, to the great damage of the plaintiff in error.

Wherefore the said plaintiff in error prays the allowance of a writ of error to the Supreme Court of the State of Nebraska for the removal of said record, judgment and proceedings in said action into the Supreme Court of the United States, for its revision and correction thereof, and for citation and supersedeas thereon and your petitioner will ever pray.

CHICAGO & NORTH WESTERN
RAILWAY COMPANY,
By LYLE HUBBARD,
W. DRESSLER,
A. A. McLAUGHLIN,
Its Attorneys.

The foregoing petition for Writ of Error and Assignments of Error filed therewith being presented this — day of November, 1914, upon due consideration whereof it is ordered that Writ of Error as prayed be allowed and that Citation be directed to William Bower, defendant in error herein for his due presence in the Supreme Court of the United States, and that bond on said writ of error be given in the sum of Thirty-Five Thousand Dollars ($35,000.00), and when filed same shall operate as a supersedeas.

———— ————,
Chief Justice.

[Endorsed:] Supreme Court of Nebraska. Filed Nov. 21, 1914. H. C. Lindsay, Clerk.

170 [Endorsed:] In the Supreme Court of the State of Nebraska. No. 17574. Chicago & North Western Railway Company, Plaintiff in Error, vs. William Bower, Defendant in Error. Petition for Writ of Error. Supreme Court of Nebraska. Filed Nov. 21, 1914. H. C. Lindsay, Clerk.

171 *Order.*

And on the same day there was rendered by said supreme court and entered of record upon the journal thereof, a certain Order in the words and figures following, to-wit:

Supreme Court of Nebraska, September Term, A. D. 1914, Nov. 21.

No. 17574.

WILLIAM BOWER, Appellee,
v.
CHICAGO & N. W. R. Co., Appellant.

Appeal from the District Court of Holt County.

The above entitled matter coming on to be heard upon the petition of the appellant therein for a writ of error from the supreme court of the United States to the supreme court of the state of Nebraska, and upon examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the supreme court of the United States the questions presented by the record in said matter—

It is ordered that a writ of error be, and is hereby, allowed to this court from the supreme court of the United States, and that the bond presented by said petitioner, be, and the same is, hereby approved. Bond fixed at $35,000.

M. B. REESE,
Chief Justice.

172 And on the 21st day of November, 1914, there was issued out of the Supreme Court of the United States, by the Clerk of the District — of the United States for the District of Nebraska, a writ of error which writ of error, was on the 21st day of November, 1914, duly allowed by the Chief Justice of the Supreme Court of Nebraska. Said original writ of error with the allowance thereof being attached hereto, and which writ of error was duly filed in the office of the Clerk of the Supreme Court of Nebraska, on November 21, 1914.

173 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Judges of the Supreme Court of the State of Nebraska, Greeting:

Because *of* the record and proceedings as also in the rendition of the judgment of a certain plea which is in the said Supreme Court of the State of Nebraska, before you or some of you, being the highest court of law or equity of said state in which a decision could be had in the said suit between the Chicago & North Western Railway Company, defendant and plaintiff in error, and William Bower, plaintiff and defendant in error, wherein was drawn in question the construction and application of a statute of the United States, the same being the Federal Employers' Liability Act of April 22, 1908, C. 149, 35 Stat. 65, as amended April 5, 1910, C. 143, 36 Stat. 291, under which statute the said William Bower claimed the right to recover from the said Chicago & North Western Railway Company for a personal injury, and under which statute the said Chicago & North Western Railway Company claimed a right, privilege and immunity, and the decision of the said Supreme Court of the State of Nebraska was against said right, privilege and immunity, a manifest error hath happened, to the great damage of the said Chicago & North Western Railway Company, plaintiff in error, as by its complaint and assignments of error appears.

We being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the party aforesaid, in its behalf do command you that — judgment be therein given that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ so

174 that you may have same at Washington on the 21st day of December next in the said Supreme Court of the United States, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court the 21st day of November, 1914.

[Seal United States District Court, District of Nebraska, Lincoln Division.] Hoyt

R. C. ~~HOUGH~~,
Clerk of the District Court of the United States for the District of Nebraska,
By J. H. McCLAY, *Deputy.*

Allowed Nov. 21, 1914.
M. B. REESE,
Chief Justice.

[Endorsed:] Supreme Court of Nebraska. Filed Nov. 21, 1914. H. C. Lindsay, Clerk.

175 [Endorsed:] 17574. Bower vs. Chicago & Northwestern Ry. Co. Writ of Error. Supreme Court of Nebraska. Filed Nov. 21, 1914. H. C. Lindsay, Clerk.

176 And on the same day to-wit, November 21, 1914, there was filed in the office of the Clerk of the Supreme Court of Nebraska by said Chicago Northwestern Railway Company a supersedeas bond in the sum of $35,000 with its approval by the Chief Justice of the Supreme Court of said state which said Supersedeas Bond and approval thereof is in words and figures as follows:

177 In the Supreme Court of the State of Nebraska.

No. 17574.

CHICAGO & NORTH WESTERN RAILWAY COMPANY, Plaintiff in Error,
vs.
WILLIAM BOWER, Defendant in Error.

Supersedeas Bond on Writ of Error.

Know all men by these presents that *with* the Chicago & North Western Railway Company as principal, and the National Surety Company as surety, a corporation organized under the laws of the State of New York, and duly authorized to transact the business of writing surety bonds in the State of Nebraska, as surety are held and firmly bound unto William Bower in the sum of Thirty-five Thousand Dollars ($35,000.00), well and truly to be paid to William Bower, defendant in error, his representative and assigns, to the payment of which, well and truly to be made, we bind ourselves heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated the twenty-seventh day of October in the year A. D. Nineteen Hundred and Fourteen.

Whereas the above named Chicago & North Western Railway Company, plaintiff in error, has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the Supreme Court of the State of Nebraska in the above entitled action,

Now, therefore, the conditions of this obligation are such that if the Chicago & North Western Railway Company shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above *application* to be void, otherwise to remain in full force and favor.

CHICAGO & NORTH WESTERN RAILWAY CO.,
By A. A. McLAUGHLIN,
Its Attorney of Record in Such Case.

178 NATIONAL SURETY COMPANY,
By GEORGE C. COOPER,
Its Attorney in Fact.

The above and foregoing bond is hereby approved and it is ordered that same operate as supersedeas.

M. B. REESE,
Chief Justice of the Supreme Court of the State of Nebraska.

Endorsed: In the Supreme Court of Nebraska. No. 17574. Chicago & North Western Railway Company, Plaintiff in Error. Supersedeas bond on writ of error. Supreme Court of Nebraska. Filed Nov. 21, 1914. H. C. Lindsay, Clerk.

179 SUPREME COURT, STATE OF NEBRASKA, *ss:*

Certificate of Lodgment.

I, H. C. Lindsay, Clerk of the said Court, do hereby certify, that there was lodged with me as such Clerk on November 21, 1914, in the matter of Chicago & North Western Railway Company, plaintiff in error vs. William Bower, defendant in error;

1. The original bond of which a copy is herein set forth.
2. Two copies of the writ of error, as herein set forth,—one for the defendant and one to file in my office.
3. Two copies of the assignments of error, as herein set forth,—one for the defendant and one to file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Lincoln, Nebraska, this December 10th, A. D. 1914.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of Supreme Court of Nebraska.

[10-cent internal revenue stamp canceled. H. C. L., 12/10/14.]

180 And afterwards to-wit, on the 30th day of November, A. D. 1914, there was filed in the office of said Supreme Court of Nebraska the original Citation with proof of service thereof, which said original Citation and proof of service is hereto attached.

181 In the Supreme Court of the State of Nebraska.

No. 17574.

CHICAGO & NORTH WESTERN RAILWAY COMPANY, Plaintiff in Error,
vs.
WILLIAM BOWER, Defendant in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to William Bower, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, within thirty days of the date hereof pursuant to writ of error filed in the Clerk's office of the Supreme Court of the State of Nebraska, wherein the Chicago & North Western Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Manoah B. Reese, Chief Justice of the Supreme Court of Nebraska this 21st day of November, 1914.

[Seal Supreme Court of Nebraska.]

M. B. REESE,
Chief Justice of the Supreme Court of the State of Nebraska.

Service of the within and foregoing Citation, and the receipt *and* copy thereof are hereby accepted and acknowledged this 28th day of November, 1914.

M. F. HARRINGTON,
Attorney for William Bower, Defendant in Error.

182 [Endorsed:] 17574. In the Supreme Court of the State of Nebraska. Chicago & North Western Railway Company, Plaintiff in Error, vs. William Bower, Defendant in Error. Citation & proof of service. Supreme Court of Nebraska. Filed Nov. 30, 1914. H. C. Lindsay, Clerk.

183 And afterwards to-wit on the 30th day of November, 1914, there was filed in the office of the Clerk of the Supreme Court of Nebraska by the said Chicago — North Western Railroad Company, a Præcipe in re the preparation of a transcript of the record in said case for return of writ of error to the Supreme Court of the United States together with proof of service of said Præcipe, said

Præcipe with proof of service of same being in the words and figures following:

184 In the Supreme Court of the State of Nebraska.

No. 17574.

CHICAGO & NORTH WESTERN RAILWAY COMPANY, Plaintiff in Error,
vs.
WILLIAM BOWER, Defendant in Error.

Præcipe.

Clerk of said court will please prepare a transcript of the record in the above entitled case for return of writ of error to the Supreme Court of the United States, including therein the following:

Petition for Writ of Error.
Assignments of Error and Prayer for Reversal.
Order allowing Writ of Error.
Writ of Error.
Citation.
Supersedeas Bond on Writ of Error.
Transcript filed in Supreme Court of Nebraska, including:
Petition.
Answer.
Reply.
Journal Entries of Trial.
Bill of Exceptions, including all of the testimony and exhibits.
Motion of Chicago & North Western Railway Co. for instructed verdict.
Ruling of Court thereon, and exceptions thereto.
Instruction No. 1 requested by defendant Railway Co. and refused.
Instructions given on request of plaintiff, William Bower.
Instructions given on request of defendant, railway company.
Instructions given on the Court's own motion.
Exceptions of defendant railway company to instructions given and refused.
Verdict of the jury.
Judgment.
Motion for New Trial.
Order overruling Motion for New Trial, and defendant's exception.
Notice of appeal to Supreme Court of Nebraska.
Supersedeas Bond on appeal to Supreme Court of Nebraska.
Præcipe in Supreme Court of Nebraska.
Assignment of Errors in Brief of Appellant Railway Co.
Opinion of the Supreme Court of Nebraska confirming judgment of the District Court.

Motion for Re-hearing (not including argument).
Order of Court overruling motion for re-hearing.
Dated this 21st day of November, 1914.

185 CHICAGO & NORTH WESTERN RAILWAY CO.,
By LYLE HUBBARD,
W. DRESSLER,
A. A. McLAUGHLIN,
Its Attorneys.

Due and legal service of the foregoing Præcipe is hereby accepted and receipt of copy thereof is hereby acknowledged this 28th day of November, 1914.

WILLIAM BOWER,
Defendant in Error,
By M. F. HARRINGTON,
His Attorney.

Endorsed: 17574. Bower v. C. & N. W. R. Co. Præcipe & proof of service. Supreme Court of Nebraska. Filed Nov. 30, 1914. H. C. Lindsay, Clerk.

186 SUPREME COURT, STATE OF NEBRASKA, *ss:*

Authentication of Record.

I, H. C. Lindsay, Clerk of said Court, do hereby certify that the foregoing pages, numbered from 1 to 185 inclusive, are a true, full and complete transcript of the following portions of the record and proceedings in the case of William Bower, Plaintiff and Appellee, vs. Chicago & North Western Railway Company, Defendant and Appellant, No. 17574, as the same now appears on file in my office, to-wit:—the Petition, Answer and Reply filed in the District Court of Holt County; the Journal entries of said trial; the Motion of Chicago & North Western Railway Company for an instructed verdict therein; the Ruling of the Court thereon and Exceptions thereto; Instruction No. 1 requested by defendant Railway Company and refused; Instructions given on request of plaintiff, William Bower; Instructions given on request of defendant Railway Company; Instructions given on the Court's own motion; Exceptions of defendant Railway Company to instructions given and refused; Verdict of the Jury; Judgment; Motion for New Trial; Order overruling Motion for a New Trial and Defendant's Exceptions; Notice of Appeal to Supreme Court of Nebraska; Supersedeas Bond on Appeal to Supreme Court of Nebraska; the Bill of Exceptions, including all of the testimony, objections and rulings of the court thereon, but not including Plaintiff's Exhibits "A" "B" and "C" and Defendant's Exhibits "1" and "2"; Præcipe in Supreme Court of Nebraska; Assignments of Error in brief of appellant Railway Company in said Court; Journal Entries in said Court showing submission of cause and judgment; Opinion of the Supreme Court of Nebraska affirm-

ing judgment of the District Court; Motion for rehearing in Supreme Court of Nebraska and Order of Court overruling same; Original Petition for Writ of Error to Supreme Court of
187 the United States; Original Assignments of Error and prayer for Reversal; Order allowing Writ of Error; Original Writ of Error and Allowance thereof; copy of Supersedeas Bond and Approval; Original Citation with proof of service; copy of Præcipe in re transcript to the United States Supreme Court; with proof of service of same.

I further certify that it is impracticable to attach to this record plaintiff's exhibits "A" "B" "C" and defendant's exhibits "1" and "2" offered in evidence and referred to in the Bill of Exceptions, for the reason that all of said exhibits are ponderous articles which do not admit of physical attachment to the record proper. I further certify that at the request of the defendant, Chicago & North Western Railway Company, I ave forwarded each and all of said exhibits to the Marshal of the Supreme Court of the United States at Washington, in the District of Columbia, to be filed with the record in this case; that plaintiff's exhibit "A" is a cylindrical lubricator glass; that plaintiff's exhibit "B" is a metal lubricator shield; that plaintiff's exhibit "C" is a flat lubricator glass; that defendant's exhibit "1" is a locomotive lubricator; that defendant's exhibit "2" is a sectional locomotive lubricator; that the said exhibits are the original exhibits filed in my office on May 1, 1912, and each one has attached thereto a tag, identifying the same and showing that it was filed in the Supreme Court of Nebraska on May 1, 1912, by H. C. Lindsay, Clerk. And each of said Exhibits has attached thereto the certificate of C. B. Scott, court reporter of the 15th Judicial District of Nebraska and of John A. Harmon, clerk of the district court of Holt County, Nebraska, identifying the same.

In Testimony Whereof, I hereunto set my hand and affix the seal of said court at my office in Lincoln, Nebraska, this tenth day of December, A. D. 1914.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of Supreme Court of Nebraska.

[10-cent internal revenue stamp cancelled. H. C. L., Dec. 10/14.]

188 UNITED STATES OF AMERICA,
Supreme Court of Nebraska, ss:

Return to Writ.

In obedience to the commands of the within Writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings mentioned in the Præcipe filed in my office in the within entitled case, together with all things concerning the same, except plaintiff's exhibits "A" "B" and "C" and defendant's exhibits "1" and "2" which are transmitted sepa-

rately to the Marshal of the Supreme Court of the United States at Washington, D. C.

In witness whereof I hereunto subscribe my name and affix the seal of said Supreme Court of Nebraska, in the city of Lincoln, this December 10th, 1914.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of Supreme Court of Nebraska.

[10-cent internal revenue stamp cancelled. H. C. L., 12/10/14.]

Clerk's costs in Supreme Court, Nebraska	$21.10
Costs of this transcript	47.85
	$68.95

Paid by Chicago & N. W. R Co.

H. C. LINDSAY, *Clerk.*

Endorsed on cover: File No. 24,470. Nebraska Supreme Court. Term No. 726. Chicago & Northwestern Railway Company, plaintiff in error, vs. William Bower. Filed December 17th, 1914. File No. 24,470.

[redacted]

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1915.

No. 726.

CHICAGO & NORTH WESTERN RAILWAY COMPANY,

Plaintiff in Error,

vs.

WILLIAM BOWER,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF PLAINTIFF IN ERROR.

I.

STATEMENT OF THE CASE.

Nature of Case.

This cause comes to this court on writ of error to review a judgment of the Supreme Court of Nebraska, the highest court of said state, affirming a judgment of the District Court of Holt County, Nebraska, in favor of defendant in error for $11,500.00 for the loss of an eye caused by the breaking of a lubricator glass on a locomotive on which defendant in error was employed

as an engineer. Right to recover is based upon Federal Employers Liability Act.

The Issues.

The defendant in error alleged in his petition that on the 28th day of November, 1910, he was in the employ of plaintiff in error, a common carrier by railroad, engaged in interstate commerce, as a locomotive engineer and while so employed and while engaged in such interstate commerce he was injured by the breaking of a lubricator glass on the locomotive on which he was employed, resulting in the loss of his left eye. He alleges that the lubricator glass was intended for locomotives carrying not to exceed 160 pounds steam pressure; that the same was used on the locomotive on which he was employed at the time of his injury which carried 190 pounds steam pressure and for such pressure same was weak, unsafe and the use of same negligence. He also alleges that the spring holding in place the shield which surrounded said lubricator glass was also weak and unsafe and that plaintiff in error "carelessly and negligently maintained such glass, shield and spring in a weak and unsafe, negligent, careless and dangerous condition, and in such condition that said lubricator was liable to break and explode at any time and to injure any person working upon the engine." He prayed for judgment for $31,750.00. (Transcript pages 1, 2, 3 and 4.)

The plaintiff in error answered admitting that it was a railroad corporation and engaged in owning and operating a line of railroad from the Village of Long

Pine, Brown County, Nebraska, and extending to Chadron in Dawes County, Nebraska. The Village of Long Pine is a division point on its said railroad, and was such division point at the time complained of. That on the 28th day of November, 1910, defendant in error was in its employ as a locomotive engineer and on said date was injured in his left eye by the breaking of a lubricator on the engine on which he was employed. All other allegations in the petition of the defendant in error were denied. Said answer further alleged "that the injuries which plaintiff received arose from and were due to dangers and risks which were open and obvious and known to plaintiff, and were assumed by him" (Transcript page 5).

Defendant in error filed a reply denying the plea of assumed risk.

The Facts.

Defendant in error was a locomotive engineer entering the railroad service as fireman on March 5th, 1885, at Missouri Valley, Iowa. He continued in the employ of the Sioux City and Pacific, Fremont and Elkhorn, and Chicago & Northwestern Railway Companies until the time of his accident, having been employed as a locomotive engineer from and after the second day of December, 1887 (Transcript page 39). For twelve years he had been employed on the division of which the city of Chadron was division headquarters. On November 28th, 1910, he was at Long Pine getting

his engine in readiness to take a passenger train from Long Pine to Chadron. He went upon the engine about 10:30 P. M. Mountain Time (Transcript page 40). The engine was number 284, Class R, with a boiler pressure of 190 pounds. He oiled the engine, took it out of the round house and placed it on the track in readiness to take train No. 3, a passenger train, to Chadron. This was part of his duty. The engine was equipped with Nathan sight feed lubricator. While the engine was standing still on the out-going track at Long Pine the glass in the lubricator broke and inflicted the injury complained of.

There was another kind of lubricator in use on a portion of the railway company's engines known as the Bulls Eye lubricator. Same had been in use for three or four years (Transcript page 41). Some of the 190 pounds pressure engines were at the time complained of equipped with Bulls Eye lubricators and some with the Nathan. The lubricators contained oil so connected with the boiler that pressure therefrom forced the oil to the parts needing it. On each of the Nathan lubricators there were three cylindrical glasses one containing oil for each cylinder and one for the air pump. These cylindrical glasses have a metal shield with perforations through which the engineer can see whether the oil is dropping in the glass tube. This metal shield is clamped upon the glass tube by means of a spring which holds it in place. The glass tube withstands the boiler pressure, the glass being necessary in order that

the engineer may know the oil is flowing properly. (Transcript pages 42 and 43.)

Glasses would sometimes break. Defendant in error recalled three occasions when these glasses broke with him during a period of twenty-five years, but states he did not know there was any danger of being injured. He testified:

> "The danger is when glass is first put in after one has broken and another one replaced in turning steam on; until it is properly tempered to the heat they would very often break * * * * We had to be careful and we used to watch them that they did not break at that time * * * * After they had been in probably six or seven weeks sometimes they wore a little thin and would break." (Transcript p. 44.)

On observing the glass getting thin it was the duty of the engineer to notify the round house foreman and have glass replaced. The glass on the same side in the same lubricator broke with defendant in error about three weeks before time of accident. The glass involved in the accident was put in to replace such broken glass, by the machinist at Chadron. The breaking of the glass caused about twenty minutes delay to defendant in error while on the road (Transcript page 45). Up to the time of his injury the defendant in error had never heard of anyone being injured by the breaking of a lubricator glass. (Transcript page 46.)

Bulls Eye lubricators were first used on engines carrying a steam pressure of 190 pounds. Defendant in error had been running a passenger engine for about fifteen years. For about three years he had been running

on passenger trains 3 and 6 between Chadron and Long Pine, 3 being westbound and 6, eastbound. They are what are called "through trains" (Transcript page 47).

Defendant in error had never heard of the breaking of a glass of a Bulls Eye lubricator (Page 51). Defendant in error believed the Bulls Eye lubricators were being substituted for the Nathan because the breaking of glasses in the Nathan lubricators delayed trains, and the Bulls Eye would save such delays. He said he did not know there was any danger of being injured by using the Nathan lubricators; that the shield was in place at the time it broke, and he knew of nothing that would make the lubricator safer. He had filled the lubricator shortly before, had opened it up and was waiting for the steam to condense so the lubricator would do its work, and was opening the feed to the air pump when the glass broke (Transcript, page 52.)

On cross examination he said he was 54 years of age. At the time he commenced working on engines there was no automatic lubricator and that oiling was required to be done by hand. The first lubricating device for locomotives came to his notice in 1886 (Transcript, page 53).

He stated the most of the time for more than twenty years he had operated a locomotive equipped with lubricator like the one complained of; that during the three years prior to his accident he had been running on passenger run between Long Pine and Chadron,

operating engines with a boiler pressure of 190 pounds, some of which were equipped with lubricators like the one complained of, and others with the Bulls Eye lubricator. He had been operating engine 284 with the lubricator complained of for probably two months (Transcript, page 54). He operated this identical engine each night from October 10th to the end of the month and each night from November 10th to the 28th, when he was injured. During all of that time it was equipped with the lubricator complained of. (Transcript, page 55.)

After taking the engine from the roundhouse and placing it on the outgoing track just prior to his accident defendant in error drew the water out of the lubricator, wiped off the shield and glass and then took out a plug making an opening in the lubricator at the top, and put in a supply of oil. The lubricator was not entirely full of oil, for, as defendant in error said:

> "We don't fill them quite full, but very near. If you filled them full and the hot oil comes there ain't room for expansion."

Oil is expanded by heat. He further testified:

Q. What was the next thing you did after filling it with oil?
A. I opened this (indicating) very easily to warm the lubricator of the boiler throttle.

Q. What is that? A throttle that opens an avenue that conveys steam?
A. Yes, sir, carriers the boiler pressure.

Q. You opened that slowly?
A. Yes, sir.

Q. And what next did you do? Did you finally get it entirely open?
A. I opened it a little and let it warm up first.

Q. And did you complete the opening of it before this explosion took place?
A. Yes, sir. (Transcript, pages 56 and 57.)

He further testified:

Q. Now after you got the valve allowing the steam to come into the condenser fully open, and the joint below fully open, then what did you do?
A. I opened the air pump. I was standing right about like this (indicating) and broke that to give oil to the air pump.

Q. Is that the time the explosion took place?
A. Not exactly. Because I watched it drop two or three drops to see that it was dropping.

Q. Well, is that when it exploded?
A. That lays up near the boiler and the trottle stands about here (indicating) and I had the tallow I put in the torch I used to see this throttle and I just took hold of the torch with one hand and the can with the other when this exploded and the shell here hit me in the eye."

He further stated that between the time he opened the valve to let the steam into the lubricator and the time of the accident about seven minutes elapsed. That during that time he was wiping the lubricator and talking with the fireman. (Transcript, page 58.)

Defendant in error further testified that prior to 1906 the high pressure engines upon which he was

employed were equipped with the Nathan lubricator, that they carried a steam pressure of 190 pounds. That from 1886 to the time of his accident he was familiar with the use and operation of the Nathan lubricator. (Transcript, page 60.) He further testified:

"Q. And you knew, did you not, if the temperature of the contents of the glass or the air on the outside changed suddenly they were liable to break?

A. When they were first put in we guarded against that.

Q. How did you guard against that?

A. Well, sir, when the glass was first put in if we put one in when we turned the steam on turned it very slowly and was away from it altogether, turned our backs to it so if it broke it would not hit us * * *

Q. Do you say to this jury there was not any danger of it breaking if you turned the steam in quickly in cold weather?

A. We dida't turn it in quickly.

Q. I asked you if there was danger of it breaking if you did that?

A. Yes, sir.

Q. And you knew that?

A. Yes, sir * * *

Q. Now with respect to the one that broke, was the shield on at that time?

A. Yes, sir, it was.

Q. Now, Mr. Bower, can you think of anybody connected with the operating part of the railroad that would know more about that lubricator and the shield and the danger connected with the use of it on an engine than an engineer that had been using it for twenty-five years?

A. No, I don't know as I do.

Q. And don't you think that at the time you got hurt that you knew as much about this lubricator and as much about the danger of its use as any man in the service of the North-Western Railroad?

A. Well, I thought—it was my understanding, and I was always taught to believe—that glasses would stand the pressure of the boiler.

Q. And it is a fact that this glass had been standing the pressure of the boiler for three weeks?

A. Yes, sir. That is the fact." (Transcript, pages 60 and 61.)

It was the duty of an engineer to report at the end of his run if there was anything wrong with the engine or any defective appliances used on it, but defendant never reported the lubricator on engine 284 and never made any complaint that the lubricator in use upon it was not proper or safe. At the time of the breaking of the lubricator glass three weeks before the accident, defendant in error asked that a Bulls Eye lubricator be substituted, but such request was not made because of regarding the lubricator involved in the accident as being dangerous. (Transcript, page 65.) On this subject he testified:

"Q. Now the only reason you wanted that was because it would save time out on the road in the event you broke down?

A. That was it exactly.

Q. You had no idea that it was any safer than this?

A. No, I never thought these were dangerous.

Q. You didn't think there was any danger connected with this at all?

A. No, I was not afraid of it."

Defendant in error offered in evidence the testimony of a number of engineers with regard to their experience with the lubricators complained of. The substance of their testimony is that the Nathan lubricators were used on both the low and high pressure engines. That the glasses sometimes would break frequently and sometimes a glass would last a considerable time. They broke on the low pressure engines as frequently as on the high pressure engines. (Transcript, pages 23, 26, 71.) They would break because of a sudden change in temperature either outside or inside and while being tempered when first put in. (Transcript, pages 23, 26, 36, 38, 72.)

Glasses had not been known to explode, but they would frequently break. (Transcript, pages 26, 28, 29, 33, 36, 38.)

The glass in Bulls Eye lubricators had not been known to break, and such lubricators were regarded as more desirable for use, and the railway company was substituting the Bulls Eye on its locomotives for the Nathan, the new locomotives all coming equipped with Bulls Eye. (Transcript, page 32.)

At the time of the trial of this case in December, 1911, approximately 75 per cent of the locomotives of plaintiff in error were equipped with the Bulls Eye lubricators. Evidence does not disclose the portion so equipped at the time of the accident, although the proportion was less. (Transcript, pages 74 and 75.)

Class Q engines came into use about ten years before the trial of this case. (Transcript, pages 22 and 35.) Such engines have a steam pressure of 190 pounds, being the same as that of Class R engines involved in the accident. (Transcript, page 47.)

The Nathan lubricators had been withstanding the steam pressure of 190 pounds on the Class Q and other high pressure engines from the time they came into use, same being used upon them exclusively until the Bulls Eye lubricator came into use about three or four years before the trial of this case. (Transcript, pages 69 and 70.) When the higher pressure engines came into use, however, the glass in the Nathan lubricators while of the same character was made heavier and stronger to withstand the higher pressure. (Transcript, page 70.) Lubricator glasses like the one that broke at the time of the injury complained of were manufactured to withstand a pressure of 500 pounds to the inch. (Transcript, page 73.)

The only evidence in the record, of injury being caused by the breaking of a lubricator glass, was with reference to the injury suffered by defendant in error and by Engineer Landis, who had a glass break on a Class Q engine caused by removing the shield and causing a sudden change in temperature. (Transcript, page 36.) A Nathan lubricator glass was identified by defendant in error as Exhibit "A" and offered in evidence. (Transcript, page 43.) A shield of the kind involved in the accident was identified by defendant

in error as Exhibit "B" and offered in evidence. (Transcript, page 43.) The glass of a Bulls Eye lubricator was identified by defendant in error as Exhibit "C" and offered in evidence. (Transcript, page 51.) Lubricators like the one involved in the accident were identified as Exhibits 1 and 2 by defendant in error and offered in evidence by plaintiff in error. (Transcript, pages 55, 56 and 69.) The foregoing exhibits are all incapable of being attached to the transcript, and same have been certified to this court and are in the possession of the marshal thereof, and must be examined to fully appreciate all of the testimony.

How the Issues were decided.

At the conclusion of the evidence plaintiff in error moved for an instructed verdict in its favor, said motion being as follows:

MOTION TO DIRECT VERDICT.

"Comes now the defendant and moves the court that the jury be directed to return a verdict for the defendant for the reason that all the evidence given and adduced upon the trial fails to show that the defendant is guilty of the acts of negligence charged in the petition; and from the evidence as adduced in the trial the truth of the averment of negligence contained in the petition cannot be ascertained or declared by a reasonable juror.

"2. For the further reason that the evidence shows without contradiction or dispute that this plaintiff was as well advised respecting the danger incident to the use of a lubricator of the kind in question upon locomotive engines as any other servant, agent or employe of defendant was or could be, and that whatever risk there was incident to the use and operation of said lubricator upon said engine was one of the ordinary risks incident to plaintiff's employment and assumed by him."

Motion was overruled by the court, and defendant excepted. (Transcript, page 76.)

Plaintiff in error thereupon requested the trial court to give to the jury the following instructions:

Instruction No. 1, Requested by Defendant.

"You are instructed that under the pleadings and evidence in this case plaintiff is not entitled to recover and your verdict will be for the defendant."

The court refused to give such instruction and defendant excepted. (Transcript, page 7.)

Thereupon the court gave to the jury the following instructions requested by plaintiff:

Instruction No. 1 Requested by Plaintiff.

"The jury are instructed that by the Act of Congress, approved April 22nd, 1908, Railroad Companies engaged in commerce between the sev-

eral states are made 'liable in damages to any person suffering injury while he is employed by such carrier in such commerce' for any 'injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency, due to its neglect, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.' The jury are instructed that the plaintiff herein is one of the persons who is protected by this legislation."

Defendant excepted. (Transcript, page 7.)

Instruction No. 2 Requested by Plaintiff.

"The same Act of Congress herein referred to also provides as follows: 'That in all actions hereafter brought against such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to any employe, or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe; provided that no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.'"

Defendant excepted. (Transcript, page 8.)

Instruction No. 3 Requested by Plaintiff.

"The rule of law is that employes assume only the ordinary risks of the employment. Where

the employer has furnished safe appliances and machinery, then the employe is held to assume the ordinary risks of injury from such appliances and machinery. But the employe is not held to assume the result of any injury sustained by reason of the negligence of the employer in furnishing and maintaining of safe appliances or machinery. So, in this case, if the jury shall find that the glass in the lubricator in question was a safe appliance furnished by the defendant company, and if, notwithstanding the exercise of proper care by the company in furnishing a safe glass in the lubricator, these injuries happened to the plaintiff, he cannot recover. But, on the other hand, if the jury shall be convinced by preponderance of the evidence that the glass which broke in the lubricator was unsafe and dangerous and was too weak to withstand the pressure which the defendant might know it would have to withstand and it was liable to explode at any time, and if the jury shall find that the defendant negligently failed to furnish a safe glass in the lubricator, and that it carelessly and negligently placed upon said engine a glass in the lubricator which was insufficient and dangerous and was liable to explode, and that as a result of this negligence of the defendant the plaintiff was injured, without fault or negligence on his part, then the plaintiff will not be held to have assumed the risk of such injuries. Whether the defendant failed to furnish a safe appliance in the lubricator and whether it was guilty of neglect, and whether the plaintiff was guilty of neglect are questions for the jury; and it is also for the jury to determine whether the injuries sustained were the result of the ordinary risks of the employment, or whether they were due to the neglect of the defendant, as herein defined."

Such instruction was given by the court to the jury and the defendant excepted. (Transcript, pages 8 and 9.)

The court also gave to the jury certain other instructions requested by defendant in error, the plaintiff in error and on the court's own motion which are unnecessary to be considered in determining the questions to be presented. (Transcript, pages 9, 10, 11, 12, 13 and 14.)

The jury returned into court its verdict on December 21st, 1911, in favor of defendant in error for $11,500. (Transcript, page 15.)

On December 22nd, 1911, and within the time provided by law, defendant (plaintiff in error) filed its

MOTION FOR NEW TRIAL

as follows:

Comes now the defendant in the above entitled cause and moves the court that the verdict of the jury heretofore returned in this cause, be set aside, vacated and held for naught and that a new trial be granted herein for the following reasons:

* * * * * * * *

6.

The court erred in giving to the jury paragraph 1 of the instructions requested by the plaintiff, to the giving of which instruction defendant excepted at the time.

7.

The court erred in giving to the jury paragraph 2 of the instructions requested by the plaintiff, to the giving of which instructions defendant excepted at the time.

8.

The court erred in giving to the jury paragraph 3 of the instructions requested by the plaintiff, to the giving of which instruction defendant excepted at the time.

* * * * * * * *

10.

The court erred in refusing to give to the jury paragraph 1 of the instructions requested by the defendant, to which refusal defendant excepted at the time.

* * * * * * * *

15.

The court erred in overruling the motion of defendant made at the close of the evidence that the jury be directed to return a verdict for the defendant, to which ruling of court defendant at the time excepted.

16.

The verdict of the jury is contrary to the evidence and not sustained thereby.

17.

The verdict of the jury is contrary to law. (Transcript, pages 16, 17 and 18.)

On December 29th, 1911, said motion for new trial was overruled, and the court entered judgment against the defendant on the verdict for $11,500 and costs, to which defendant duly excepted. (Transcript, page 18.)

On March 23rd, 1912, and within the time provided by law defendant (plaintiff in error) filed in the office of the Clerk of the District Court of Holt County, Nebraska, its notice of appeal from such judgment, and supersedeas bond which was approved, and on said date defendant filed with the clerk of said court bill of exceptions properly certified and allowed by the trial judge, thus perfecting the appeal of said cause to the Supreme Court of the State of Nebraska. (Transcript, pages 19 and 20.) (Pages 19 to 79 both inclusive.)

On the 1st day of May, 1912, a transcript of pleadings, all proceedings, bill of exceptions, notice of appeal, supersedeas bond, and a complete record for appealing said cause to the Supreme Court of Nebraska as provided by the laws of the State of Nebraska was filed in the office of the Clerk of the Supreme Court of Nebraska, and on said date praecipe was filed with the clerk of said Supreme Court of Nebraska by appellant (plaintiff in error) as provided by law, and appeal from the judgment entered in said cause by the said District

Court of Nebraska was thus properly lodged in the Supreme Court of Nebraska (Transcript, page 1, page 20, 79 and 80).

Thereafter and on April 21st, 1913, and within the time provided by law, appellant (plaintiff in error) filed in said cause in the Supreme Court of Nebraska its

ASSIGNMENT OF ERRORS

as follows:

"Appellant complains of the trial, verdict and judgment in this case for the following reasons:

1.

The court erred in overruling defendant's motion for an instructed verdict made at the close of all of the testimony.

2.

The court erred in refusing to give to the jury instruction No. 1 asked by the defendant.

3.

The court erred in giving to the jury instruction No. 1 requested by the plaintiff.

4.

The court erred in giving to the jury instruction No. 2 requested by plaintiff.

5.

The court erred in giving to the jury instruction No. 3 requested by plaintiff.

* * * * * * * *

10.

The court erred in overruling defendant's motion for new trial.

11.

The court erred in entering judgment for the plaintiff." (Transcript, pages 80 and 81.)

This case was thereafter argued and submitted in the Supreme Court of Nebraska and on June 23rd, 1914, said court entered its order and judgment affirming the judgment of the District Court. (Transcript, pages 81 and 82.) On the same date the said Supreme Court of Nebraska filed its opinion in said cause (Transcript, pages 83 to 91, both inclusive). The substance of its opinion is set forth in syllabi thereto, prepared by the court, which syllabi contains the following:

> "1. The Courts of this State will take judicial notice of the fact that the 'Black Hills' are in South Dakota, and of the further fact that the western terminus of the main line of the Chicago & North Western Railway Company, running from Omaha northwest through the city of Long Pine, Nebraska, is in the 'Black Hills' in the State of South Dakota.
>
> "2. And where the evidence shows that the western division of said railway company is known as the 'Black Hills Division,' the term 'through trains' when applied by railroad men to trains on said division will be considered to mean trains

running over the division from one terminal point to the other.

"3. Evdence examined and set out in the opinion was sufficient to show that at the time he was injured plaintiff was engaged in interstate business, and that his action was properly brought under the Federal Employers Liability Act of April 22nd, 1908, 35 U. S. St. at large, Pt. 1, Ch. 149, p. 65.

"4. Evidence examined and set out in the opinion was sufficient to justify the submission of the question of defendant's negligence to the jury.

"5. Record examined and held not to contain any evidence to require submission of the question of assumption of risk to the jury." (Transcript, page 83.)

Testimony relied upon by the court as being sufficient to justify submitting the question of defendant's (plaintiff in error) negligence to the jury is set forth on pages 85, 86 and 87 of the transcript. In substance same shows that the Bulls Eye lubricator is a newer and better appliance than the Nathan lubricator; that it will perform the same functions as well, and the glass had not been known to break. That the Bulls Eye had been in use at the time of the trial for three or four years, which would mean two or three years at the time of the accident, and was being substituted for the Nathan. That defendant in error and one other person had been known to have been injured by the breaking of a glass in the Nathan lubricator. Testimony relied upon by the court includes the following from Roundhouse Foreman of the defendant (plaintiff in error):

"Q. Even the switch engines have Bulls Eys?
A. The new power all comes with Bulls Eye.
Q. It is recognized as the proper appliance now, is it not?
A. Yes, sir.
Q. Has been for three or four years?
A. I think so.
Q. And is it true glasses do explode in the Nathan?
A. Well, they have been known to explode.
Q. And hurt men?
A. Sure.
Q. And this was what made the change, is not that the fact?
A. Not necessarily so. That is one of the facts.
Q. Another one is the breaking of the old glass lubricators would delay the trains at times?
A. Yes, that is another." (Transcript, page 87.)

On the 25th day of July, 1914, and within the time provided by law, plaintiff in error filed in said cause its

MOTION FOR RE-HEARING

as follows:

Appellant moves the court to set aside its opinion and order affirming the judgment entered by the District Court of Holt County, Nebraska, in the above entitled cause and to grant a re-hearing of said cause, and alleges as reasons therefor the following:

1. The court erred in holding in its opinion that the facts in this case did not require the submission

to the jury of the question whether plaintiff assumed the risk of injury from the breaking of the lubricator glass involved in the accident complained of.

2. The court erred in holding in its opinion filed in this case that the evidence showed as a matter of law that plaintiff did not know and by the exercise of reasonable care could not know of the dangers to which he was subjected in operating the engine on which he was employed at the time of the accident, equipped with the lubricator complained of.

3. In giving instruction No. 3 requested by the plaintiff which advised the jury that an employe does not assume the risk of any injury sustained by reason of negligence of the employer in furnishing and maintaining safe appliances or machinery, and that if defendant was negligent in furnishing the lubricator glass in controversy plaintiff would not assume the risk of injuries resulting from its use the trial court erred, and this court should have so held in its opinion and should have for said reason reversed the case.

4. The court erred in holding in its opinion in this case that the evidence was sufficient to warrant the jury in finding that defendant was negligent in using the lubricator complained of, and in not having substituted a Bulls Eye lubricator for it.

* * * * * * * *

6. The court erred in holding in said opinion that the evidence was sufficient to show as a matter of law that defendant was engaged in interstate com-

merce at the time of the accident complained of, and that plaintiff was employed in such commerce. (Transcript, pages 91 and 92.)

Thereafter and on the 16th day of October, said motion for re-hearing was overruled and order entered denying the same. (Transcript, pages 92 and 93.)

Thereafter by appropriate proceedings this case was brought to this court on writ of error to the Supreme Court of Nebraska. (Transcript, pages 95 to 105, both inclusive.)

The questions for consideration of this court in disposing of this writ of error are:

I.

Was the doctrine of assumption of risk as applied to the case at bar properly submitted to the jury in instruction No. 3 requested by defendant in error.

This question was raised: By exception to said instruction No. 3 requested by defendant in error. (Transcript, pages 8 and 9.)

By ground No. 8 of Motion for New Trial. (Transcript, pages 7 and 8.)

By the fifth assignment of error in Supreme Court of Nebraska. (Transcript, page 81.)

By the third ground of Motion for Re-Hearing, (Transcript, page 92.)

and by the fourth and fifth asignments of error in support of petition for writ of error from this court to the Supreme Court of Nebraska. (Transcript, page 94.)

II.

The question of whether defendant in error assumed the risk of performing his duties on locomotive equipped with the lubricator complained of was at least for a jury to pass upon, and the court could not properly hold as a matter of law that the defendant in error did not assume such risk.

This question was raised: By exception to instruction No. 3 given to the jury by request of defendant in error. (Transcript, pages 8 and 9.)

By grounds No. 8 of Motion for New Trial. (Transcript, page 17.)

By the fifth assignment of error in the Supreme Court of Nebraska. (Transcript, page 81.)

By the first, second and third grounds of motion for re-hearing, (Transcript, pages 91 and 92).

and by the fourth, fifth, sixth and seventh assignments of error in support of petition for writ of error from this court to the Supreme Court of Nebraska. (Transcript, page 94.)

III.

Was the evidence sufficient to show that plaintiff in error was negligent in furnishing defendant in error a locomotive equipped with the lubricator complained of for use in performing his duty as an engineer.

This question is raised: By a motion to instruct a verdict in favor of plaintiff in error. (Transcript, page 76.)

By instruction No. 1 requested by plaintiff in error and refused. (Transcript, page 7.)

By ground No. 16 of motion for new trial. (Transcript, page 17.)

By the first, second, tenth and eleventh assignments of error in Supreme Court of Nebraska. (Transcript, pages 80 and 81.)

By fourth ground of omtion for re-hearing, (Transcript, page 92.)

and by third assignment of error in support of petition for writ of error from this court to the Supreme Court of Nebraska. (Transcript, page 94.)

Specification of Errors.

I.

The Supreme Court of the State of Nebraska erred in affirming the judgment of the District Court of

Nebraska within and for Holt County. (Transcript, page 82.)

II.

The Supreme Court of the State of Nebraska erred in holding and deciding that the evidence submitted on the trial of said cause was sufficient to require submission to the jury of the question of whether plaintiff in error was negligent in the respects charged in the petition by defendant in error.

(See Syllabus, paragraph 4, Transcript, page 83; Opinion of Court, Transcript, pages 85 to 88, both inclusive.)

III

The Supreme Court of the State of Nebraska erred in holding and deciding that the giving of instruction No. 3 requested by the defendant in error, which advised the jury that a servant does not assume the risk of the master's negligence in furnishing and maintaining appliances and machinery for the servant's use was not reversible error. (See fifth paragraph of syllabus, Transcript, page 83; Opinion of Court, Transcript, pages 85 to 88, both inclusive.)

Said paragraph is as follows:

> "The rule of law is that employes assume only the ordinary risks of the employment. Where the employer has furnished safe appliances and machinery, then the employe is held to assume

the ordinary risks of injury from such appliances and machinery. But the employe is not held to assume the result of any injury sustained by reason of the negligence of the employer in furnishing and maintaining of safe appliances or machinery. So, in this case, if the jury shall find that the glass in the lubricator in question was a safe appliance furnished by the defendant company, and if, notwithstanding the exercise of proper care by the company in furnishing a safe glass in the lubricator, these injuries happened to the plaintiff, he cannot recover. But, on the other hand, if the jury shall be convinced by preponderance of the evidence that the glass which broke in the lubricator was unsafe and dangerous and was too weak to withstand the pressure which the defendant might know it would have to withstand and it was was liable to explode at any time, and if the jury shall find that the defendant negligently failed to furnish a safe glass in the lubricator, and that it carelessly and negligently placed upon said engine a glass in the lubricator which was insufficient and dangerous and was liable to explode, and that as a result of this negligence of the defendant the plaintiff was injured without fault or negligence on his part, then the plaintiff will not be held to have assumed the risk of such injuries. Whether the defendant failed to furnish a safe appliance in the way of glass in the lubricator and whether it was guilty of neglect, and whether the plaintiff was guilty of neglect are questions for the jury; and it is also for the jury to determine whether the injuries sustained were the result of the ordinary risks of the employment, or whether they were due to the neglect of the defendant, as herein defined." (Transcript, pages 8 and 9.)

IV.

The Supreme Court of Nebraska erred in holding and deciding that the trial court did not commit reversible error in advising and instructing the jury in instruction No. 3 requested by defendant in error that if plaintiff in error was negligent in furnishing lubricator, glass, and spring in controversy, defendant in error would not assume the risk of injury resulting from their use.

(See syllabus, paragraph 5, Transcript, page 83; Opinion of the Court, Transcript, pages 85 to 88, both inclusive. See also instruction No. 3 set out in Specification No. IV.)

V.

The Supreme Court of Nebraska erred in holding and deciding that the evidence introduced on the trial of said cause was insufficient to justify submitting to the jury the question of whether defendant in error assumed the risk of injury from the breaking of the lubricator glass complained of and because thereof if there was error in the instruction on the question of assumed risk such error was not prejudicial.

(See Syllabus, pargaraph 5, Transcript, page 83; Opinion of the Court, Transcript, page 88.)

VI.

The Supreme Court of Nebraska erred in holding that the evidence introduced on the trial of said cause showed as a matter of law that defendant in error did

not know and by the exercise of reasonable care could not know of the danger to which he was exposed in operating locomotive on which he was employed at the time of the accident complained of while same was equipped with the lubricator complained of.

(See Syllabus, paragraph 5, Transcript, page 83; Opinion of the Court, Transcript, page 88.)

BRIEF OF ARGUMENT.

I.

The plaintiff in error has been denied a right, privilege and immunity claimed under the Federal Employers Liability Act, and this case is therefore properly brought to this court on writ of error to the Supreme Court of the State of Nebraska.

See cause o faction set forth in Petition, (Tran, sricpt, pages 1 to 11).

Answer filed by plaintiff in error in denial and pleading assumption of risk, (Transcript, page 5).

Motion to instruct verdict, (Transcript, page 5).

Instruction No. 1 requested by plaintiff in error and refused, (Transcript, page 7).

Instructions 1 and 2 requested by defendant in error given, (Transcript, pages 7 and 8).

Motion for new trial, grounds 10, 15 and 16, (Transcript, pages 16 and 17).

Assignment of errors in Supreme Court of Nebraska, Nos. 1, 2, 10 and 11, (Transcript, pages 80 and 81).

Grounds of motion for rehearing No. 6, (Transcript, page 92).

Judicial Code, section 237.
St. L., I. M. & S. Ry. v. McWhirter, 229 U. S. 275, 276, 277.
Seaboard Air Line Ry. Co. v. Horton, 233 U. S. 492, 499.
Seaboard Air Line Ry. Co. v. Podgett, 236 U. S. 668-671.
North Carolina R. R. Co. v. Zachery, 232 U. S. 248.
Grannis v. Ordean, 234 U. S. 385, 392.
Carlson v. Curtis, 234 U. S. 103, 105, 106.
Southern Ry. Co. v. Crockett, 234 U. S. 725, 730.
Toledo, St. L. & W. Ry. v. Slavin, 236 U. S. 454-457.

II.

When a Federal right or immunity depends upon a finding of facts this court will, on a writ of error to a state court, re-examine the facts and reach its own conclusion in order to determine the question of the Federal right or immunity.

St. L., I. M. & S. Ry. v. McWhirter, 239 U. S. 265, 277.

Seaboard Air Line R. R. v. Horton, 233 U. S. 492, 499.

Kansas City Southern Ry. Co. v. Albers Commission Co., 223 U. S. 577, 591.

Creswell v. Knights of Pythias, 225 U. S. 245, 261.

North Carolina R. R. Co. v. Zachery, 232 U. S. 248, 258.

Yazoo & Miss. R. R. v. Wright, 235 U. S. 376, 378.

III.

The trial court should have instructed a verdict in favor of plaintiff in error on the ground that the evidence was insufficient to show negligence on its part, in response to its motion therefor made at the close of the evidence, and instruction No. 1 requested by it, and refused, and the Supreme Court of Nebraska erred in holding in its opinion that the evidence was sufficient to require the submission to the jury of the question of alleged negligence of plaintiff in error.

See Motion to Instruct Verdict. (Transcript, page 76.)

Instruction No. 1 requested by plaintiff in error and refused. (Transcript, page 7.)

See also second specification of error.

(a) **The mere happening of the accident is not evidence of negligence.**

Patton v. Railway, 179 U. S. 658, 663 and 664.
Chicago & North Western Ry. v. O'Brien, 132 Federal, 593 C. C. A. 8th Circuit.

Chicago, Burlington & Quincy R. Co. v. Kellogg, 55 Nebraska 748 76 Northwestern Reporter 462.

Cudahy Packing Co. v. Roy, 71 Nebraska, 600-606, 99 Northwestern Reporter 231.

(b) **The fact that the Bulls Eye lubricator may have ben a new and beter appliance was not sufficient to show that the defendant was negligent in using the lubricator complained of.**

Thompson on Negligence, Vol. 4, Sec. 3993.

Washington, Etc., Railway Co. v. McDade, 135 U. S. 554, 570.

Westinghouse Co. v. Heimlich, 127 Federal, 92, 93, C. C. A. 6th Circuit.

Omaha Bottling Co. v. Theiler, 59 Nebraska, 257, 80 Northwestern Reporter 821.

Central Granaries Co. v. Alt, 75 Nebraska, 249, 252, 255, 107 Northwestern 1015.

(c) **For many years the Nathan was the only lubricator known. It was necessarily used on high pressure engines. Mere delay in substituting a better device after same was discovered is not evidence of negligence.** When defendant in error first commenced work on locomotives there was no automatic lubricator, and oiling was done by hand. The first lubricating device came in 1886. (Transcript, page 83.) The Nathan lubricator was used exclusively until the coming of the Bulls Eye lubricator about 1906. (Transcript, page 60.) Class Q engines came into use ten years before the trial of this case. They had a steam pressure of 190 pounds. (Transcript, page 47.) Na-

than lubricators were used on the Class Q engines before the Bulls Eye came into use. (Transcript, pages 69 and 70.) Glasses were of the same make and kind for the high pressure as for the lower pressure engines except they were made heavier and stronger to withstand the higher pressure. (Transcript, page 70.) Each glass was manufactured to withstand a pressure of 500 pounds to the inch. (Transcript, page 73.) The glasses broke no more frequently on the high pressure than on the low pressure engines. (Transcript, page 23.) The glasses would usually break when first being warmed up on first being put in or on a sudden change in temperature inside or out. (Transcript, page 23.) No claim is made that the glass in controversy was defective as an individual, but merely that such glasses were as a class when without specific defects insufficient and unsafe.

The defendant in error had used the Nathan lubricator for more than twenty years on both low and high pressure engines. (Transcript, page 54.) Had never known of anyone being injured by the breaking of a glass until his own accident. (Transcript, page 46.) No evidence of injury to anyone else except Engineer Landers, and evidence does not show whether same occurred before or after the accident complained of. (Transcript, page 36.) The glass in controversy broke while defendant in error was warming it up. (Transcript, pages 56, 57 and 58.) Glass had withstood the boiler pressure of the engine for three weeks before it broke. (Transcript, page 61.)

IV.

The Supreme Court of Nebraska erred in holding and deciding in its opinion that the evidence did not justify submitting to the jury the question of whether defendant in error assumed the risk of injury from the breaking of the lubricator glass complained of.

See syllabus of poinion, paragraph 5, (Transcript, page 83); Opinion, (Transcript, page 88).

See specifications of error, 5 and 6.

(a) **An employe assumes the risk of injury in using defective machinery or appliances when defects and dangers are known to him or in the exercise of reasonable care same should be known to him.**

Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 504.

Texas & Pacific Ry. v. Harvey, 228 U. S. 319, 321, 322.

Chicago, Burlington & Quincy Ry. v. Shalstrom, 195 Federal 725, 729; C. C. A. 8th Circuit.

Utah Consolidated Mining Co. v. Bateman, 176 Federal, 57, 63, C. C. A. 8th Circuit.

St. Louis Cordage Co. v. Miller, 126 Federal 495, 511, C. C. A. 8th Circuit.

Itner Co. v. Killian, 67 Nebraska, 589; 93 Northwestern 951.

Vanderpool v. Partridge, 79 Nebraska 165, 112 Northwestern 318.

New York & N. H. Railway Co. v. Visvari, 210 Federal 118, — C. A. A. 2nd Circuit.

Schlemmer v. Buffalo, etc. Ry., 220 U. S. 590, 596.

(b) **The evidence was sufficient to require submitting to the jury the question of whether defendant in error knew or in the exercise of care should have known of the danger of being injured by the breaking of the lubricator glass complained of.**

While defendant in error could not state the exact number of times glass had broken with him, he remembered three occasions. He stated the danger was when first putting in and in turning steam on they would very often break. That they would wear thin in time and break. (Transcript, page 44.) That if the temperature changed quickly the glass would break. That the steam was turned on slowly to avoid breaking, and to protect himself from injury in the event it might break he would turn his back on it while it was warming up. (Transcript, pages 60 and 61.) That in his judgment he knew as much about the lubricator and the danger from using it as anyone in the employ of the company. (Transcript, page 61.) That he was taught to believe it would stand the boiler pressure and that the identical glass involved in the accident had actually done so for three weeks before it broke. (Transcript, page 61.)

V.

Instruction No. 3 requested by defendant in error and given to the jury was erroneous in that it advised the jury that if plaintiff in error was negligent in furnishing or maintaining lubricator glass, the defendant in error would not assume the risk, and the Su-

preme Court of Nebraska erred in not reversing the case because of the giving of such intsruction.

See instruction No. 3 (Transcript, pages 8 and 9).
Also plaintiff in error's exception, same page.
See also specifications of error, 3 and 4.

Texas & Pacific Ry. Co. v. Harvey, 228 U. S. 319, 321.
Seaboard Air Line Ry. Co. v. Horton, 233 U. S. 492, 504.
Gila Valley Ry. Co. v. Hall, 232 U. S. 94, 101, 102.

ARGUMENT.

I.

The plaintiff in error has been denied a right, privilege and immunity claimed under the Federal Employers Liability Act, and this case is therefore properly brought to this court on writ of error to the Supreme Court of the State of Nebraska.

In his petition defendant in error expressly grounds his action upon the Federal Employers Liability Act. He alleges that when injured the plaintiff in error was engaged in interstate commerce and that he was in its service as an engineer and employed in such commerce. (See petition, Transcript, page 2.)

The answer of plaintiff in error expressly pleaded the assumption of risk of defendant in error (Transcript, page 5). At the conclusion of the testimony plaintiff in error moved for an instructed verdict, the grounds of such motion being that the evidence failed to show that it was guilty of the negligence charged in the petition, and did show that the defendant in error

assumed the risk of injury in performing his duties with an engine equipped with the lubricator complained of. This motion was overruled and defendant excepted. (Transcript, page 76.)

The right of defendant in error to recover under the evidence on the cause of action sued on was also challenged by instruction No. 1 requested by plaintiff in error. Such instruction was:

> "You are instructed that under the pleadings and evidence in this case plaintiff is not entitled to recover, and your verdict will be for the defendant."

The instruction was refused, and plaintiff in error excepted. (Transcript, page 7.)

This instruction as well as the motion to instruct challenged the right of defendant in error to recover on the cause of action sued on, and since the cause of action was based on the Federal act, plaintiff in error thereby contended that defendant in error was not entitled to recover under such act, which contention by overruling the motion and denying the instruction the court overruled.

The trial court by giving to the jury instructions Nos. 1 and 2 requested by defendant in error expressly based the right of defendant in error to recover upon the Federal act. (Transcript, pages 7 and 8.)

The right to recover on the cause of action sued on was again challenged by plaintiff in error by mo-

tion for new trial. Grounds 6, 7, 10, 15, 16 and 17. (Transcript, pages 16 and 17.)

The question of the right of defendant in error to recover under the evidence on the cause of action sued on was again challenged by plaintiff in error in its assignment of errors in the Supreme Court of Nebraska. (Transcript, pages 80 and 81.) And in motion for rehearing in said court. (Transcript, page 92.) In each case the contentions of the plaintiff in error were overruled and its right to immunity from liability under the Federal Employers Liability Act in said suit was denied.

The questions of whether plaintiff in error was shown by the evidence to be negligent, and as to whether defendant in error assumed the risk were presented and the contentions of the plaintiff in error in each instance overruled.

The plaintiff in its assignment of errors filed in support of its petition for writ of error in this case alleged as error the action of the Supreme Court of Nebraska in holding that the evidence was sufficient to show that plaintiff in error was guilty of negligence charged in the petition, in holding the evidence was insufficient to justify submitting to the jury the question of whether defendant in error assumed the risk and erred in failing to reverse the case because of erroneous instructions on the question of assumed risk, contained in instruction No. 3 given on request of defendant in error. (Transcript, pages 93 and 94.)

The record therefore affirmatively shows that the right of plaintiff in error to immunity from liability under the Federal Employers Liability Act was urged on two grounds:

First—The evidence failed to show negligence of plaintiff in error as charged in the petition.

Second—That defendant in error assumed the risk of injury from the breaking of the lubricator glass.

Each of such contentions was denied, the court holding that the Federal Employers Liability Act was applicable to the facts disclosed, that the evidence was sufficient to require submitting the question of negligence of the plaintiff in error to the jury and was insufficient to require submitting to the jury the question of whether defendant in error assumed the risk.

All requirements of section 237 of the Judicial Code are therefore fully met in this record, and this court has jurisdiction to review the acts of the State Court in the respects referred to, upon this writ of error.

Such is the holding of this court in St. L., I. M. & S. v. McWhirter, 229 U. S. 265, 275, 276 and 277. In that case recovery was sought for the death of a flagman, liability being based on the Federal act. At the close of the testimony there was a motion for an instructed verdict, which was denied, and there was a verdict and judgment for the plaintiff which was af-

firmed by the highest court of the state, and the case brought to this court on writ of error. There was a motion to dismiss the writ of error on the ground that no Federal question was presented. The motion was overruled, this court saying:

> "And, of course, as the cause of action alleged was exclusively placed on the Federal statute and the defense therefore alone involved, determining whether there was liability under the statute, the mere statement of the case involved the Federal right and necessarily required, from a general point of view, its determination * * * . While it is true, as we have said, that coming from a state court the power to review is controlled by revised statute No. 709 (now section 237, Judicial Code), yet where in a controversy of a purely Federal character the claim is made and denied that there was no evidence tending to show liability under the Federal law, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law."

On a similar state of facts the same conclusion was announced in Seaboard Air Line Railway Co. v. Horton, 233 U. S. 492, 499.

In the case of Toledo, St. Louis & Western Railway Co. v. Slavin, 236 U. S. 454-457, the same conclusion is reached where the evidence showed that the case was governed by the Federal Employers Liability Act, although the allegations of the petition based the right of recovery on a state statute and the Federal act was not pleaded either by the plaintiff or

defendant. The defendant by proper procedure contended that the right of recovery if any existed must be under the Federal act. The contention was denied and proper exception taken. There was a verdict and judgment against the defendant which was reversed by an intermediate court of appeals. The highest court of the state, however, to which the case was taken, reversed the action of the intermediate court of appeal and affirmed the judgment entered by the trial court, without an opinion. It was held by this court that the Federal right claimed was necessarily denied by the action of the highest court of the state even though it filed no opinion and gave no reason for its conclusion. This action was reversed by this court on writ of error.

The foregoing authorities sufficiently illustrate the proposition presented, but see additional authorities cited under Division I of brief.

II.

When a federal right or immunity depends upon a finding of facts this court will, on a writ of error to a state court re-examine the facts and reach its own conclusion in order to determine the question of the Federal right or immunity.

The foregoing proposition is illustrated in Kansas City Southern Railway Co. v. Albers Commission Co., 223 U. S. 577, 591. A motion to dismiss writ of error to the state court was involved. The Federal right

claimed arose under the Interstate Commerce Act. The solution of the question depended upon a determination of the facts. In denying the motion to dismiss this court said:

> "While it is true that upon a writ of error to a state court we cannot review its decision upon pure questions of fact, but only upon questions of law bearing upon the Federal right set up by the unsuccessful party, it equally is true that we may examine the entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter. That this is so, is amply shown by our prior rulings. Thus, in Mackay v. Dillon, 4 Howard 421, 447, where the state courts had given to certain evidence an effect claimed to be unwarranted by an applicable law of Congress, it was held that their decision 'on the effect of such evidence may be fully considered here.' In Dower v. Richards, 151 U. S. 658, 667, where the conclusiveness of findings of fact by a state court was elaborately considered, it was recognized that where the question is 'of the competency and legal effect of the evidence as bearing upon a question of Federal law the decision may be reviewed by this court.'"

The same doctrine is announced in Creswill v. Knights of Pythias, 225 U. S. 245, 261, in the following language:

> "While it is true that upon a writ of error to a state court we do not review findings of fact, nevertheless two propositions are as well settled as

the rule itself, as follows: (a) That where a Federal right has been denied as the result of a finding of fact which it is contended there was no evidence whatever to support and the evidence is in the record the resulting question of law is open for decision; and (b) that where a conclusion of law as to a Federal right and finding of fact are so intermingled as to cause it to be essentially necessary for the purpose of passing upon the Federal question to analyze and dissect the facts, to the extent necessary to do so the power exists as a necessary incident to a decision upon the claim of denial of the Federal right."

This doctrine has been applied to suits involving the Federal Employers Liability Law where the questions of the sufficiency of the evidence to show negligence of the defendant and the sufficiency of the evidence to show assumption of risk were involved, in the cases of St. L., I. M. & S. Ry. v. McWhirter, 229 U. S. 265, 277; Seaboard Air Line R. R. v. Horton, 233 U. S. 492, 499; North Carolina R. R. Co. v. Zachery, 232 U. S. 242, 258; Yazoo & Mississippi Valley R. R. Co. v. Wright, 235 U. S. 376, 378, and other cases.

III.

The trial court should have instructed a verdict in favor of plaintiff in error on the ground that the evidence was insufficient to show negligence on its part in response to its motion therefor made at the close of the evidence, and instruction No. 1 requested by it and refused, and the Supreme Court of Nebraska erred in holding in its opinion that the evidence was sufficient to require the submission to the jury of the question of alleged negligence of plaintiff in error.

The first ground of the motion to instruct was expressly based on insufficiency of evidence to show negligence. (Transcript, page 76.) The instruction requested was based on insufficiency of the evidence for said purpose. (Transcript, page 7.)

(a) For many years the Nathan was the only lubricator known. It was necessarily used on high pressure engines. Mere delay in substituting a better device after same was discovered is not evidence of negligence.

We have set out quite fully in statement of facts the testimony bearing upon this question. In substance same shows that prior to about 1906 the Nathan lubricators were the only kind known and the only kind used by the North Western Company, and that defendant in error had been using such lubricators since 1886. Until the Bulls Eye lubricator came out about

that time the Nathan was used on the high pressure engines, that is engines with a steam pressure of 190 pounds, as well as on the low pressure engines. (Transcript, page 60.)

The glass tube in the lubricator was necessary in order that the engineer could see that the oil was dropping and the lubricator working properly. (Transcript, page 50.) The glass tubes would frequently break. They would break most frequently when warming up or when first put in and before being properly tempered to the heat. They also break upon a sudden change of temperature, either inside or out. A cold side wind would sometimes break them. (Transcript, page 23, page 36, page 38 and page 71.)

The glasses would also wear thin after six or seven weeks, and would break. This was evidenced by moisture accumulating on the outside, and being observed by the engineer he would report it for removal and same would be done at the roundhouse. (Transcript, pages 44 and 45.)

Bulls Eye lubricators instead of having a glass tube had a bulls eye of thick glass through which the engineer could look to see the oil dropping. The Bulls Eye lubricators first came into use between three and four years prior to the trial of this case. (Testimony of defendant in error, Transcript, page 41.)

Class Q engines have been in service about ten years before the trial of this case, and were high pres-

sure, carrying 190 pounds. (Transcript, page 60.) Seven years before the trial of this case defendant in error had a lubricator glass break on a Q engine carrying 190 pounds steam pressure. (Transcript, page 63.) The glasses were made heavier for the high pressure engines, but otherwise were the same. (Transcript, page 7.) The glass tube sustained the same pressure as the boiler of the engine and were made to withstand a pressure of 500 pounds to the inch. (Transcript, page 73.) The glasses broke as often on the low pressure as on the high pressure engines, (Transcript, page 23.), indicating that the pressure was not the primary cause of the glass breaking.

Defendant in error was employed on a passenger run exclusively for three years before the accident, using nothing but Class R and Class Q engines, each high pressure carrying 190 pounds steam pressure. Prior to that time he used such engines in the freight service. Prior to the coming of the Bulls Eye they were all equipped with the kind of lubricator complained of. (Transcript, pages 59 and 60.)

Defendant in error remembered of but three occasions that lubricator glasses broke with him in twenty-five years' experience. (Transcript, page 44.) One broke on a Q engine about seven years before the accident. He remembers the particular engine. (Transcript, page 45 and page 63.) At that time defendant in error had never heard of the Bulls Eye lubricator. (Transcript, page 45.) No glass broke with

him thereafter until three weeks before his accident, at which time the glass which broke causing his injury was substituted by the foreman of the company in the roundhouse at Chadron. (Transcript, page 45.)

The engine involved was a Class R, carrying 190 pounds steam pressure. (Transcript, page 54.) The glass substituted at the time of the breaking three weeks before the time of the accident continued in service and actually withstood a boiler pressure of 190 pounds for three weeks up to the time of the accident. (Transcript, page 61.)

Defendant in error had been using the same engine with the same lubricator two-thirds of the time for two months immediately preceding the accident, but one glass breaking during that time prior to the accident. (Transcript, page 58.) During the three years he was exclusively in passenger service and using engines of 190 pounds steam pressure a portion were equipped with the Nathan and a portion with the Bulls Eye lubricators. (Transcript, page 54.)

It was his duty to report defects, but he never reported this lubricator except for replacing of glasses. (Transcript, page 64.) With his extended experience he did not regard the lubricator as dangerous, although he requested that a Bulls Eye be substituted a short time before for the purpose of saving time in replacing a broken glass when out on the road. (Transcript, pages 65 and 66.) Prior to his injury he never heard

of anyone being injured by the breaking of a glass. (Transcript, page 46.)

The only evidence of injury aside from that of defendant in error was to Engineer Landis, but whether before or after injury of defendant in error is not disclosed. (Transcript, pages 35 and 36.) Landis' injury was caused by sudden change of temperature on the glass when he removed the shield. (Transcript, page 36.)

The defendant in error recognized the danger of the glass breaking when first put in, and in warming up too fast. (Transcript, pages 60 and 61.) Also the danger of breaking if filled too full and leaving insufficient room for expansion. (Transcript, page 57.) At the time of the accident defendant in error was warming the lubricator so that it would work properly. He had let in the hot steam and had opened the valve through which the oil passed to the air pump. The warming up process had not been completed when the glass broke. (Transcript, pages 55, 56, 57 and 58.) The shield was in place and there is no evidence that there was any defect in either shield or spring or any specific defect in the glass. (Transcript, page 61.)

The defendant in error testified that he knew of nothing that would make the lubricator safer, indicating that as an individual the lubricator was in as good condition as it could be placed. (Transcript, page 52.) He was advised as to the possibility of the glass breaking and that during the warming up process

to protect himself he should turn his back to it. This he ordinarily did. (Transcript, pages 60 and 61.) The Bulls Eye lubricator had not been known to break, and the railway company was substituting same for the Nathan. Defendant in error says that he supposed the substitution was to save time on the road. (Transcript, page 52.)

The new high power engines being procured by the railway company after the Bulls Eye lubricator came out came equipped with it. (Transcript, page 42.) The engines already in service were having Bulls Eye substituted for the Nathan so that at the time of the trial of the case, more than a year after the accident, about 75 per cent were equipped with it. (Transcript, page 74.) So far as the evidence discloses substitutions were made as rapidly as conditions would permit of.

The evidence does not disclose whether the defendant in error allowed the lubricator to warm up too rapidly at the time of the accident or not. It does not disclose whether he allowed too little room for expansion, either one of which causes being sufficient to furnish an adequate explanation for the breaking of the glass.

No physical defect in the spring, shield or glass is shown. It is not shown that the glass was not sufficient as manufactured and installed to withstand a pressure of 500 pounds to the inch, as contemplated in

the manufacture and installation of it. The margin of safety if capable of sustaining such pressure was 310 pounds. The glass actually did withstand the boiler pressure of this engine, being 190 pounds, for three weeks before the accident without any apparent evidence of weakness.

What then caused the glass to break? It would seem evident that it did not break merely because of the pressure, unless defendant in error, in charge of the engine, secured an excessive pressure, which is not shown.

It must be that it had not worn thin, for defendant in error knew the evidences showing such fact, and makes no claim that the glass had worn thin. Some cause other than the pressure from the boiler must furnish the explanation for its breaking.

The boiler pressure is eliminated because it had withstood such pressure in service for three weeks, and it had not worn thin. The only explanation after eliminating such causes which the evidence discloses is a sudden change of temperature, such as warming up too rapidly or exposure to cold air on the outside, or filling to the point of leaving too little room for expansion. These matters were under the control of defendant in error.

That the cause of the breaking is more likely to be due to sudden change in temperature by warming up too rapidly or by leaving too little room for expansion

is, we think, fully shown by the fact that the lubricator had been shut off from the boiler during the day and had become cold and defendant in error was engaged in warming it up and filling it in getting the engine ready for the road. He was in the very act of doing the things which furnish the only plausible explanations for the breaking of it. Unless, therefore, the mere showing that the glass might break under such circumstances was of itself evidence of negligence it would seem there was no evidence upon which to submit such question to the jury.

It is shown that the lubricator was necessary in the operation of the engine and that the Nathan was the only one known until three or four years before the trial of this case, or two or three years before the accident. Certainly there was no negligence in using it in the absence of a better device. The Bulls Eye is a better device, but it came into use but two or three years before the accident. In twenty-five years defendant in error had never heard of anyone being hurt in the use of it. Of the seven engineers who testified in this case, most of them of more than twenty years experience, Landis was the only one who testified to an injury aside from the defendant in error, and so far as known the fact of his injury may have occurred subsequent to the injury to defendant in error, and such evidence of danger thus not known to plaintiff in error until after the accident occurred.

Under such circumstances we do not think a device properly used when installed and retained in service for two or three years after a better device comes upon the market can by such fact, be said to be negligently used when the defendant in error, an engineer, who had used it for twenty-five years did not regard it as dangerous and believed the substitution of the better device was solely for the purpose of saving time. No such danger from its use is shown as to justify the finding of plaintiff in error neglient merely because substitution was not made within two or three years after the new device was obtainable.

(b) **The mere happening of the accident is not evidence of negligence.**

The foregoing proposition is very clearly expressed in the case of Patton vs. Railway Company, 179 U. S. 658, 663, 664, where this court said:

> "The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employe to establish that the employer has been guilty of negligence."

Indeed the rule seems to be that the mere happening of the accident while proper to be proven, is not evidence of negligence and does not tend to prove negligence. The foregoing recites the rule of this court, of the Supreme Court of Nebraska, and the rule enforced by courts generally. While we have cited other cases in our brief, the foregoing sufficiently illustrates the rule.

(c) **The fact that the Bulls Eye Lubricator may have been a newer and better appliance, was not sufficient to show that the defendant was negligent in using the lubricator complained of.**

The foregoing proposition is sustained by Thompson on Negligence, Volume 4, Section 3993, where the author states:

> "The master is not under obligation under all circumstances to make use of the best and safest appliances and instruments nor is he responsible for the failure to discard one which is not of the safest and best kind which can be secured, and to supply something in its place which may be safer * * * * But he discharges the duty to his servant when he provides those which are in common and general use in his business and which are considered safe by other employers generally who are engaged in the same business, and which may be safely operated by the exercise of ordinary, reasonable care. Nor will he become liable by reason of the fact that other machines or methods of work which are safer than his are also in common use. But he discharges his duty if the machinery, tools and appliances which he furnishes for the use of the servant are reasonably safe for the purpose intended."

It would seem that the Nathan Lubricator was reasonably safe for the purpose intended when an engineer has used it for twenty-five years and had experience with it breaking and did not regard it as dangerous. It would seem to be reasonably safe when in twenty-five years but two specific cases of injury from the breaking of it have been called to the court's at-

tention. Ne employe, officer or agent of the railway company ought to be expected to have greater knowledge of the danger of using it than the men who actually, habitually and daily used it in performing their duties.

There was no evidence that this appliance was dangerous to those using it unless the mere fact of two injuries in twenty-five years on a railway division is sufficient to show such fact. If such fact can be regarded as evidence that the appliance was dangerous still same must be insufficient to show negligence because the injury to defendant in error was not known by the railway company in time to discard the appliance before the accident, and the injury to Landis is not shown to have occurred until after such accident. We think the evidence of danger in using the appliance is not sufficient, without more, to permit the jury to say that the plaintiff in error was negligent merely because it had not discarded a necessary device already in use, when a better device came upon the market, within two or three years after the better device might have been first procured.

The doctrine announced in Thompson on Negligence is subscribed to by the Supreme Court of Michigan, in Chadford vs. Railroad Company, 111 Michigan, 390; 69 N. W. 661. In Omaha Bottling Company vs. Theiler, 59 Nebraska, 257; 80 Northwestern, 821, and numerous other cases, and in Railroad Company vs. McDade, 135 U. S. 554, 570, where this court said:

"Neither individuals nor corporations are bound as employers, to insure the absolute safety of machinery or mechnical appliances which they provide for the use of their employes. Nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service by providing them with machines reasonably safe and suitable for the use intended."

We contend the jury could not say under the evidence in this case, that the railway company did not perform its full duty in harmony with the rule announced.

IV.

The Supreme Court of Nebraska erred in holding and deciding in its opinion the evidence did not justify submitting to the jury the question of whether defendant in error assumed the risk of injury from the breaking of the lubricator glass complained of.

Such was the holding of the Supreme Court of Nebraska, as shown by Paragraph 5 of the syllabus, (Transcript, page 83), and the language of the opinion, (Transcript, page 88).

The lower court did instruct the pury on the question of assumed risk, but submitted such question in an improper instruction, as will be shown hereafter. If there was evidence to go to the jury on the question of assumed risk, it would seem clear that the erroneous instruction given must require reversal of the case.

While the opinion of the court does not state in express language the effect of the opinion is that the erroneous instruction was without prejudice because there was no evidence justifying the submission of such question.

We propose to show, first, that the evidence was such as to require the submitting of the question of assumed risk to the jury, and having shown same, show that the instruction given was erroneous and therefore the giving of same reversible error.

(a) **An employe assumes the risk of injury in using defective machinery or appliances when defects and dangers are known to him or in the exercise of reasonable care, same should be known to him.**

The foregoing rule is announced in the case of C. B. & Q. R. R. Co. vs. Shalstrom, 195 Federal 725, 728, 729, C. C. A., 8th Circuit, which involved injury to a carpenter through the insufficiency of a scaffold. The scaffold was merely built in an unsubstantial way. Holding that he assumed the risk of going upon it, in the performance of his duites, the court said:

> "Although the risk of the master's negligence and of its effect unknown to the servant is not one of the ordinary risks of the employment which he assumes, yet if the negligence of the master or its effect is known and appreciated by the servant, or is obvious, or, 'so patent as to be readily observed by him by the reasonable use of his senses, having in view his age, intelligence and experience,' and he enters and continues in the employment without objection, he elects to assume the risk of it, and he cannot recover for the damages it causes.

> "When a defect is obvious or, 'so patent as to be readily observed by a servant by the reasonable use of his senses, having in view his age, intelligence and experience,' and the danger and risk from it are apparent, he cannot be heard to say that he did not realize or appreciate them."

In the case of Union Stock Yards Company vs. Goodwin, 57 Nebraska, 138; 77 Northwestern, 357, which involved an injury caused by defective brake on a refrigerator car, the Supreme Court of Nebraska announces the rule as follows:

> "On the other hand, contrary to the contention of the plaintiff in error, the doctrine of this court is that 'an employe assumes the risk arising from defective appliances used or to be used by him, or from the manner in which a business in which he is to take part is conducted, when such risks are known to him or are apparent, and obvious to persons of his experience and understanding.' "

The opinion of the Supreme Court of Nebraska in the case at bar announces the rule as follows:

> "The rule is now well established not only in this state but elsewhere, that a servant assumes only the dangers incident to his employment which are known to him or which by the exercise of reasonable care, he would know." Transcript, p. 88.

In the case of Bryce vs. Ry. Co., 103 Iowa, 665, 671, which involved injury to brakeman by coming in contact with brace on a bridge over which he was passing on a freight train, the brace extending too close to the car on which he was riding, that court said:

"If he could have ascertained by reasonable observation, its dangerous proximity to the track, it must be regarded as an obvious danger, which was assumed by continuing in the service of the defendant. In other words, what a man in law ought, by the exercise of reasonable diligence to know, he does know."

In Omaha Bottling Co. vs. Theiler, 59 Nebraska 257, 263, 80 Northwestern 821, 822, which involved injury to a twenty-year-old boy from the explosion of a cider bottle being filled by a machine operated by him, the explosion being caused by too great pressure for the bottle to withstand, the Supreme Court of Nebraska held that the boy assumed the risk as a matter of law, saying:

"The danger that cider bottles would explode while being filled was not, to say the least, one obviously beyond the comprehension of a boy of average intelligence, 19 or 20 years old, who had worked at the business for years, and had recently been charged with the control and supervision of the bottling department of defendant's establishment. It would, indeed, be an exceptionally prudent and cautious master who would deem it necessary to give cautionary instructions to his servant in such a case. The plaintiff knew how the bottling business was conducted. He knew soda water and mineral water bottles would explode occasionally under ordinary pressure; and it is scarcely possible that he was ignorant of the fact that cider bottles would also explode under high pressure. That he was ignorant of the hazards of the business we cannot believe; and to hold that the defendant should have warned him of such hazards would, in view of the circumstances, he requiring it

to conform its conduct to an unreasonable standard of care."

The case of Seaboad Air Line Ry. vs. Horton, 233 U. S. 492-504, involved the explosion of a water glass on a locomotive, destroying the sight of the engineer's eye. In that case this court in discussing the question of assumption of risk, said:

> "But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employe is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the cirumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this court. Choctaw, etc., Ry. vs. McDade, 191 U. S. 64-68; 48 L. Edition 96-100; 24 Supreme Court Reporter 24; 15 American Negligence Reports 230; Schlemmer vs. Buffalo R. & P. R. Co., 220 U. S. 590-596; 55 L. Edition 596-600; 31 Supreme Court Reporter 561."

The foregoing case was brought under the Federal Employers Litbility Act, and the foregoing language is an application of the doctrine of assumption of risk with respect to such act.

Other cases are cited in our brief both from this court and other courts sustaining the same view, but the foregoing sufficiently illustrate the proposition contended for.

(b) The evidence was sufficient to require submitting to the jury the question of whether defendant in error assumed the risk of injury by the breaking of the lubricator glass.

The evidence to which we called attention in Paragraph (a), Division V of this argument with respect to the question of alleged negligence of the railway company should be considered in support of the foregoing proposition in connection with further testimony of defendant in error, to which we now direct the attention of the court. The following testimony all comes from defendant in error.

Defendant in error was at the time of the accident 54 years of age. He had been in the railroad service continuously from 1886 to the time of his accident, and had been running an engine from 1887. He had used lubricators of the kind complained of since 1886 when the Queen engines came on to his division equipped with them. Before that time engines were required to be oiled by hand. (Transcript page 53.) Most of the time for more than twenty years he had operated an engine equipped with this kind of lubricator. In the earlier days the engines carried 140 to 145 pounds steam pressure. (Transcript page 47.) About ten years before the trial of this case, which occurred in December, 1911, Class Q engines carrying 190 pounds steam pressure came on to the division on which defendant in error was employed, and he commenced at said time to operate them. (Transcript page 60.) They were

equipped for a number of years, until the Bulls Eye came two or three years before the accident complained of, with lubricators of the kind complained of. The glasses in these lubricators would frequently break and defendant in error was familiar with such fact. With respect to such matter defendant in error testified:

"Q. During your experience as engineer did any of these glasses of these Nathan Lubricators break with you?

A. Yes, I have had them break.

Q. How many?

A. I could not say exactly. I remember of three during my running experience.

Q. During a period of twenty-five years?

A. Yes, sir.

* * * * * * * * *

Q. Is there any signs when there might be some danger of these glasses breaking?

A. Yes, sir.

Q. From your own experience of 25 years as an engineer what times, if any, during the use of these glasses in these lubricators is there any danger of their breaking as far as you know?

A. The danger is when the glass is first put in after one is broken and another one replaced, in turning the steam on until it is properly tempered to the heat they would very often break.

Q. And you had to be careful then?

A. We had to be careful and we used to watch them that they did not break at that time.

Q. Outside of the time when you would be getting them tempered to the heat, what other times as far as your experience goes was there any dan-

ger of these glasses in these lubricators breaking?

A. Well, after they had been in probably six or seven weeks, sometimes they wore a little thin and would break.

Q. Would you have any warning of the fact that they were getting thin?

A. To a certain extent, yes, sir.

Q. In what way?

A. The glass wears thin, by the steam and water pressure going through and they will show dampness or a little water around the glass.

Q. Where would they wear a little thin and the steam have some effect on them?

A. Well, they generally wear around what we call the gasket or gland near the end.

* * * * * * * * *

Q. When that would happen that you found the glass was getting thin usually in your experience with the company, what would you do?

A. When we are at a division point it was the rule to report it and we would get one replaced, and if we were on the road so we couldn't do it we would replace them ourselves.

Q. How long before you received this injury do you know of one breaking on your engine?

A. Well, the glass on the same side in the same lubricator broke about three weeks before this time.

Q. And how long before that had you any of these lubricators break?

A. I could not just remember, but I remember it was about seven years ago, for I remember the engine I was running.

Q. And at the time the glass broke seven years before you were injured were any of these Bulls Eye Lubricators in use?
A. No, sir, I had never seen one at least." (Transcript pages 44 and 45.)

He further testified:

"Q. And some seven years before the injury you had a glass break on the Q?
A. Yes, sir.
Q. That is one of the high pressure engines also?
A. Well, she carried 190 pounds." (Transcript page 63.)

The engine on which defendant in error was employed when injured was No. 284, Class "R," which also carried 190 pounds of steam, the same pressure as the Q engines. (Transcript pages 45 and 62.) It was on this identical engine that the glass broke three weeks before the injury complained of, and the glass substituted at that time was the one that broke when defendant in error was injured. It had been standing the boiler pressure for three weeks prior to the accident. (Transcript page 61.)

Defendant in error knew that if the glass broke and he was in close proximity to it he might be injured. He also admitted that he thought he knew as much about the lubricator as any other employe of the railway company. On this subject he testified:

"Q. I will ask you if it is not true prior to the year 1906 the lubricators that you have got here (referring to Exhibits 1 and 2) are not the

lubricators that was exclusively used on the North Western engines on this line?

A. Yes, I think they are.

Q. And all the engines were equipped with just the kind of lubricators as Exhibit 1? (Nathan Lubricator.)

A. Up until the time the Bulls Eye came.

Q. And that is true of the high pressure and low pressure ones too is it not?

A. Well, what high pressure engines we had here had these on before the Bulls Eye came.

Q. And you had the Qs—Class Q had been used on the road for ten years, hadn't they?

A. I don't think so, that long up here. I guess they had in the east division.

Q. And equipped with this kind of lubricator?

A. Well, I wasn't down there at that time, but I suppose they was.

Q. Didn't these Q engines come up on the west end frequently equipped with these kind of lubricators in the years 1902, 1903, 1904 and 1905?

A. I suppose they did.

Q. And didn't you see them frequently?

A. Yes, I seen them.

Q. And you run some of them, didn't you?

A. Without doubt I did.

Q. And what pressure did they carry?

A. They sure carried 190 pounds.

Q. So you don't mean to be understood, Mr. Bowers, as saying to this jury, it wasn't customary and usual in the operation of this railroad to use this kind of lubricators on 190 pounds pressure engines?

A. Well they did use them.

Q. And there was a time when they didn't use any other kind on those high pressure engines?
A. I think there was before they got the others.

Q. And from the time these lubricators was discovered away back in 1886 down to the time you got hurt, as an engineer you was familiar with their use and operation wasn't you?
A. Yes, sir.

Q. And the manner of using and handling them, and you knew d[illegible] you not that if the temperature of the contents of the glass or the air on the outside changed suddenly they were liable to break?
A. When they were first put in we guarded against that.

Q. And how did you guard against it?
A. Well, sir, when the glas swas first put in if we put one in cold we turned the steam on turning it very easily and was away from it—turned our backs to it so if it broke it would not hit us.

* * * * * * * * *

Q. You say to this jury there was not any danger of it breaking if you turned the steam in quickly in cold weather?
A. We didn't turn it in quickly.

Q. I asked you if there was danger of it breaking if you did that.
A. Yes, sir.

Q. And you knew that?
A. Yes, sir.

* * * * * * * * *

Q. Now Mr. Bower, can you think of anybody connected with the operating part of the railroad that would know more about that lubricator and the shield and the danger connected with

the use of it on an engine than an engineer that had been using it for twenty-five years?

A. No, I don't know as I do.

Q. And don't you think at the time you got hurt that you knew as much about this lubricator and as much about the danger of its use as any man in the service of the North Western Railroad?

A. Well, I thought—it was my understanding and I was always taught to believe that it would stand the pressure of the boiler.

Q. And it is a fact that this glass had been standing the pressure of the boiler for three weeks?

A. Yes, sir, that is the fact." (Transcript pages 60 and 61.)

Defendant in error had been running exclusively as a passenger engineer for three years, using Class Q and Class R engines. Each carried 190 pounds steam pressure, a portion of them being equipped with the Bulls Eye lubricators and a portion with the Nathan. (Transcript pages 54 and 55.)

He had been running on Engine 284 twenty nights a month for two months, same being equipped with the lubricator complained of during all of said time, and a glass broke thereon three weeks before his accident. (Transcript pages 54 and 55.) At the time he was injured he was opening the valves, allowing hot steam to flow into and through the lubricator, filling the lubricator and getting the engine ready to go upon the road. He was warming the lubricator up, tempering it to the heat. He was engaged in doing that which usually accompanied the breaking of a glass. (Transcript pages

55 to 58.) He knew that in filling the lubricator he must leave room for expansion to avoid the breaking of the glass. On such matter he testified:

"Q. And did you then fill it with oil?
A. Yes, sir.

Q. Did you fill it entirely full?
A. No, we don't fill them quite full, but very near. If you fill them full and the hot oil comes, there ain't room for expansion.

Q. Oil takes more space when expanded by heat, does it?
A. Yes, sir." (Transcript page 57.)

It is thus seen that defendant in error was an engineer of twenty-five years experience, during more than twenty of which he operated engines equipped exclusively with the type of lubricator complained of. These lubricators were used on both low and high pressure engines, having thicker glass for those of high pressure. Bulls Eye Lubricators did not come into use until two or three years before the accident complained of. Several years before that date, a lubricator glass of this type broke with defendant in error on a Class Q, a high pressure engine. One also broke with him on the identical engine involved in his accident three weeks before. He states that in warming up a lubricator, the glasses would very frequently break, although he claims that with him he remembers but three occasions where the glass actually broke. When he uses the word "frequently," he either indicates that they broke with him more than three times, or that he was very familiar

with their breaking when being used by other engineers. The evidence does disclose that they broke frequently with other engineers. While defendant in error had not heard of anyone being injured by the breaking of a glass before his accident, it appears that he appreciated the danger of being injured if the glass broke because he states that while warming up the glass he kept away from it, turned his back on it so that if it broke it would not hurt him. Did he not have as much knowledge of the likelihood of the glass breaking and of the danger to him if it did break as the railway company had? If the jury could say under the evidence that the railway company was negligent in using such a lubricator because of the danger to which those using it were subjected, we ask, cannot the court say as a matter of law that the engineer who used it from the time of its coming into use and for a period of almost twenty-five years, who knew that it would break, who turned his back on it when most likely to break to avoid being hit by it, did not know or appreciate the danger of being injured by it if it did break?

The railway company must acquire this knowledge through its agents. Through whom could it be expected to acquire knowledge of the danger of using these appliances, if not through the engineers who were the sole users of them? We ask, how could the railway company receive such knowledge through its engineers if the engineers did not appreciate the fact of which the railway company is supposed to acquire knowledge through them. The engineers must be the

conduit through which the knowledge comes to the railway company.

The Supreme Court of Nebraska says that the jury can find from the facts in this case that the railway company knew of the danger of using these lubricators in time to have substituted the Bulls Eye, before defendant in error was injured, and yet the defendant in error, one of the sources from which it must obtain the information and as fully advised and familiar with it as any other engineer, did not know and could not know of such danger, merely because he states he did not know there was any danger in using it, although his own testimony contradicts such statement, and says that he did know the danger and on certain occasions turned his back to it to avoid being injured by it. The conclusion of the Nebraska court is, to our minds, as inconsistent as verdicts of juries frequently are in cases where master and servant are sued jointly for the negligence of the servant, the master's liability being based on the doctrine of respondeat superior, and the jury finds a verdict in favor of the servant but finds the master liable for the negligence of such servant.

We think, therefore, if there was such danger in the use of this appliance as to justify the finding of negligence on the part of the railway company in furnishing it to defendant in error for his use, then it must follow that from the facts disclosed the jury should have been permitted to determine whether defendant in error knew of such danger and assumed the

risk. Indeed, we feel satisfied that if the evidence is sufficient to justify submitting to the jury the question of negligence of the railway company, the assumption of risk in using the lubricator on the part of defendant in error must follow as a matter of law. For the reversal of this case, we are not required to go to that extent, for as will appear in the succeeding paragraph of this argument, the erroneous instruction given by the trial court to the jury will demand a reversal of this case, even though defendant in error did not asume the risk as a matter of law.

V.

Instruction No. 3 requested by defendant in error and given to the jury was erroneous in that it advised the jury that if plaintiff in error was negligent in furnishing or maintaining the lubricator glass, the defendant in error would not assume the risk, and the Supreme Court of Nebraska erred in not reversing the case because of the giving of such instruction.

Instruction No. 3 is found on pages 8 and 9 of the Transcript. To the giving of same, plaintiff in error excepted. Such instruction is also set out at length in connection with specification of error No. 3, on page 28 of this brief. Without setting out such instruction again in full, same is in part as follows:

> "The rule of law is that employes assume only the ordinary risks of the employment; where the employer has furnished safe appliances and machinery then the employe is held to assume the ordinary risks of injury from such appliances and

machinery, but the employe is not held to assume the result of any injury sustained by reason of the negligence of the employer in furnishing and maintaining of safe appliances and machinery."

It will be noted the foregoing is the usual expression of the rule with respect to the dangers and risks that inhere in the employment. There are two kinds of risks which the employe may assume. Those risks that inhere in the employment, where the master has exercised ordinary care, the employe assumes, if experienced in the employment, whether he knows of them or not. The employe, however, does not assume the risks growing out of negligence of the master unless he knows thereof or same are so apparent that in the exercise of ordinary diligence he would be presumed to know thereof.

After giving expression to the foregoing quoted language in such instruction, the court proceeded to make an application thereof to the facts in the case at bar, saying:

"So in this case, if the jury shall find that the glass in the lubricator in question was a safe appliance furnished by the defendant company, and if, notwithstanding the exercise of proper care by the company in furnishing a safe glass in the lubricator, these injuries happened to the plaintiff, he cannot recover. But, on the other hand, if the jury shall be convinced by preponderance of the evidence that the glass which broke in the lubricator was unsafe and dangerous and was too weak to withstand the pressure which the defendant might know it would have to withstand and it was liable to explode at

> any time, and if the jury shall find that the defendant negligently failed to furnish a safe glass in the lubricator, and that it carelessly and negligently placed upon said engine a glass in the lubricator which was insufficient and dangerous and was liable to explode, and that as a result of this negligence of the defendant, the plaintiff was injured, without fault or negligence on his part, then the plaintiff will not be held to have assumed the risk of such injuries."

It is thus seen that the court applied the rule with respect to assumption of risks of dangers inherent in the employment without negligence of the master to a case where the risk involved is claimed to be due to a danger created by negligence of the master, and the jury is told in substance that if the railway company was negligent in furnishing the lubricator glass, and the defendant in error was free from contributory negligence, he did not assume the risk of injury from the breaking of the glass.

This doctrine has been repeatedly repudiated by this court. We call attention to the case of Texas & Pacific Ry. Co. vs. Harvey, 228 U. S. 319, 321, where the rule in such cases is announced as follows:

> "At the common law, a servant assumes the ordinary risks of his employment, but he is not obliged to pass upon the methods chosen by his employer in discharging the latter's duty to provide suitable appliances and a safe place to work, and he does not assume the risk of the employer's negligence in performing such duty. This rule is subject to the exception that, where a defect is known to the employe or is so patent as to be readily observed

by him, he cannot continue to use the defective appliance in the face of knowledge and without objection, without himself assuming the hazard incident to such situation. If a defect is so plainly observable that the servant may be presumed to know its existence and he continues in the master's employment without objection, he is said to have made his election to thus continue, notwithstanding the master's neglect, and in such a case, he cannot recover."

In the case of Gila Valley Ry. vs. Hall, 232 U. S. 94, 101, 102, the rule is expressed in the following language:

"An employee assumes the risk of dangers normally incident to the occupation in which he voluntarily engages, so far as these are not attributable to the employer's negligence. But the employe has a right to assume that his employer has exercised proper care with respect to providing a safe place of work, and suitable and safe appliances for the work, and is not to be treated as assuming the risk arising from a defect that is attributable to the employer's negligence, until the employe becomes aware of such defect, or unless it is so plainly observable that he may be presumed to have known it. Moreover, in order to charge an employe with the assumption of risk attributable to a defect due to the employer's negligence, it must appear not only that he knew (or is presumed to have known) of the defect, but that he knew it endangered his safety; or else such danger must have been so obvious that an ordinarily prudent person under the circumstances, would have appreciated it."

Must it not be said, notwithstanding defendant in error states he did not know there was any danger of being injured by the breaking of the lubricator glass, that knowing that the glasses were likely to break, that it was wise to turn his back upon the glass when warming it up, as an ordinarily prudent person, he was bound to and did, appreciate the danger of being injured if the glass should break while his face was in close proximity to it?

The case of Seaboard Air Line Ry. vs. Horton, 233 U. S. 492-504-505-506-507-508, was a case almost identical in its facts, instruction on assumption of risk and history, with the case at bar. A water glass instead of a lubricator glass was involved. A glass guard had been removed from the water glass which furnished the defect complained of. In the case at bar, the shield was in place, and is not shown to have been defective. In each case the glass broke destroying the sight of the engineer's eye. In the one case the negligence charged was the absence of the glass guard. In the other case the negligence charged, was insufficient strength of the lubricator glass. In the Horton case, the trial court instructed the jury in part, as follows:

> "A man assumes the risk, when he takes employment incident to the class of work which he has to perform. * * * He does not assume the risk incident to the negligence of his employer in providing machinery and appliances with which he has to work."

The foregoing language was doubtless taken from the same source as the language of the instruction of which we complain. In the Horton case, the court also undertook, after giving the general instruction to apply same in a concrete way to the facts of the case. In such application the assumption of risk by the servant was made to depend upon the glass being furnished to him in a safe condition, which means that in furnishing the glass, the master must have been free from negligence. While different in language, in effect it is the same as the language of the instruction of which we complain. This court held the instruction was bad. In so holding, the following language was used:

> "Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employe is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike, are so obvious that an ordinarily prudent person under the circumstances, would have observed and appreciated them." Id. 504.

It is thus seen that the instruction given deprived the railway company of the defense of assumed risk in the event the jury found that it was negligent. If it was not negligent, no liability would exist in any event. If it was negligent, under this instruction, there was no escape, because the jury was told that contributory negligence would not defeat a recovery, and that if the railway company was negligent there could be no assumption of risk.

If, therefore, the evidence was sufficient to require submitting to the jury the question of whether defendant in error assumed the risk, it must follow that the erroneous instruction on that subject was prejudicial to the defendant in having deprived it entirely of such defense. Indeed, the Supreme Court of Nebraska did not undertake to say the instruction was a correct statement of the law. It avoided expressing any opinion on the subject by saying that the evidence was insufficient to warrant submitting such question to the jury. Of course, if the evidence was insufficient to require submitting the question of assumed risk to the jury an erroneous instruction on that subject would not furnish grounds for reversing the case. It was in this way that the Supreme Court of Nebraska disposed of this matter.

Believing that the evidence was insufficient to show negligence on the part of the plaintiff in error, and that the evidence if insufficient to show that defendant in error assumed the risk of using the lubrica-

tor glass in the condition in which it was, as a matter of law, was clearly sufficient to require the submission of such question to the jury on a proper instruction, and that the instruction given on such subject being clearly erroneous, the case must be reversed by this court. We accordingly so ask.

Repectfully submitted,

WILLIAM G. WHEELER,
A. A. MCLAUGHLIN,
Solicitors and Counsel for Plaintiff in Error.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 301

CHICAGO & NORTHWESTERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

WILLIAM BOWER,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA

REPLY BRIEF OF PLAINTIFF IN ERROR

WILLIAM G. WHEELER,
WYMER DRESSLER,
A. A. MCLAUGHLIN,
Solicitors and Counsel for Plaintiff in Error.

KLOCK BROS., OMAHA.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 726.

CHICAGO & NORTHWESTERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

WILLIAM BOWER,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA

REPLY BRIEF OF PLAINTIFF IN ERROR

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1. The cause of action upon which the defendant in error recovered judgment was based upon the Federal Employers' Liability Act.

Defendant in error seeks to avoid the consequences of having recovered judgment under the Federal Employers' Liability Act, and contends in his brief in this court that he recovered under the state law instead.

In other words, he denies jurisdiction of this court on the theory that the case was decided in the state court on a non-federal ground. In this contention he is contradicted by the record.

It is true the petition of defendant in error alleged that plaintiff in error was engaged in both state and interstate commerce, but it also alleged that plaintiff was employed on defendant's engine which was being put in readiness to haul a passenger train from Long Pine to Chadron, and

> "that the said train was one which left Council Bluffs in the state of Iowa on said date, and said train was being transported from Council Bluffs, Iowa, through the state of Nebraska, and to the town of Deadwood, in South Dakota, and that the said train was engaged in interstate commerce and was engaged in transporting passengers, mail, baggage and express through the states of Iowa, Nebraska, and other states, and into the states of South Dakota and Wyoming, and said train was engaged during all of this trip in interstate commerce, and in commerce between the several states of the Union, and that the plaintiff at the time he received all of the injuries hereinafter mentioned, and during all of the time he worked upon said engine, was the employe of defendant, engaged in state and interstate commerce, and engaged in aiding and assisting as such employe in transporting persons, mail, baggage and express through Illinois, Iowa and other states, and through Nebraska, and into South Dakota and Wyoming." (Transcript of Record, p. 2.)

Instruction No. 1 requested by defendant in error and given to the jury by the trial court (Transcript of Record, p. 7) expressly told the jury "plaintiff herein is one of the persons who is protected by this legislation" (Federal Employers' Liability Act). In Instruction No. 2 requested by defendant in error and given to the jury by the trial court (Transcript of Record, p. 8) the jury was instructed with reference to the effect of contributory negligence, the rule given being that prescribed by the Federal Act, and contrary to the rule of the state of Nebraska. The opinion of the Supreme Court of Nebraska shows that the case was not decided on the theory that it arose under the state law, but on the contrary that the court expressly found that it did arise under the Federal Act.

In paragraph 3 of syllabus prepared by the court (Transcript of Record, p. 83) is the following:

> "Evidence examined and set out in the opinion held sufficient to show that at the time he was injured plaintiff was engaged in interstate business, and that his action was properly brought under the Federal Employers' Liability Act of April 22nd, 1908. 35 U. S. Stat. at Large, Part 1, Chap. 149, p. 65."

The case was therefore considered by the Supreme Court of Nebraska as arising under the Federal Act and the rights of plaintiff in error were disposed of upon that theory and with respect to the Federal Act.

2. The fact that plaintiff in error did not in its answer admit that plaintiff in error was engaged in interstate commerce, and that defendant in error was employed therein at the time of being injured, does not deprive plaintiff in error of the protection of the Federal Act if the proof showed that the cause of action arose thereunder.

The answer of plaintiff in error in the state court admitted that it was a railroad corporation, the owner of and operating a line of railroad from Long Pine to Chadron, Nebraska; admitted that plaintiff was in its employ as a locomotive engineer and while so employed was injured by the breaking of a lubricator glass on the engine on which he was employed, resulting in the loss of his left eye. It denied every allegation in the petition not admitted to be true. It pleaded the assumption of risk by defendant in error and that the injury was due to the negligence of defendant in error and without fault of plaintiff in error.

Since the cause of action was based on the Federal Act, a denial of negligence of the employer and plea of assumption of risk by the employe would necessarily be with reference to the Federal Act if the facts showed the cause of action was properly brought thereunder. Such would be the case if the petition did not disclose whether the suit was brought under the Federal or state law, and the same conclusion must follow where the fact appeared both in the petition and proof that the case of action was based on the Federal law.

That the Federal law will be regarded as applicable and the rights of the parties enforced with respect thereto if the proof shows that the case arose thereunder, even without such fact appearing in the petition, has been held repeatedly by this court.

In the case of M. K. & T. Ry. vs. Wulff, 226 U. S. 570, the rule is announced as follows:

> "It is true the original petition asserted a right of action under the laws of Kansas, without making reference to the act of Congress. But the court was presumed to be cognizant of the enactment of the Employers' Liability Act, and to know that with respect to the responsibility of interstate carriers by railroad to their employes injured in such commerce after its enactment it had the effect of superseding state laws upon the subject. Therefore the pleader was not required to refer to the Federal Act, and the reference actually made to the Kansas statute no more vitiated the pleading than a reference to any other repealed statute would have done."

In the recent case of Kansas City Western Railway Company vs. McAdow, 36 Supreme Court Reporter 252-253, where complaint was made of an amendment to a petition basing right to recover upon the Federal Act, which had not been mentioned in the original pleading, this court said:

> "The amendment introduced no fact inconsistent with those first alleged, and it was unnecessary when the facts were stated to invoke the act of Congress in terms. The law governing the situation is equally the law of the state, whether derived from Congress or the state legislature, and must be noticed by the courts."

3. Plaintiff in error contended in the trial court and in the Supreme Court of Nebraska that the evidence was insufficient to show that it was negligent with reference to the cause of action sued on, and that defendant in error assumed the risk with reference to such cause of action. In denying such contention a right and immunity claimed by plaintiff in error under the Federal Act was denied.

Instruction No. 1 requested by plaintiff in error (Transcript of Record, p. 7) requested the court to advise the jury that "under the pleadings and evidence in this case plaintiff is not entitled to recover and your verdict will be for the defendant." Instruction was refused and plaintiff in error excepted.

At the close of the testimony plaintiff in error moved the court to instruct the jury to return a verdict in its favor upon two grounds; first, the evidence was insufficient to show that it was guilty of the negligence charged in the petition, and second, the evidence showed that defendant in error assumed the risk. This motion was overruled, and plaintiff in error excepted (Transcript of Record, p. 76).

The failure to give Instruction No. 1 requested by plaintiff in error was made the tenth ground of its motion for new trial, and the overruling of its motion for an instructed verdict made at the close of the testimony was made the fifteenth ground of its motion for new trial (Transcript of Record, p. 17).

The refusal to give such Instruction No. 1 requested by plaintiff in error and the overruling of its motion for an instructed verdict at the close of the testimony were made the first and second assignments of error in the Supreme Court of Nebraska (Transcript of Record, p. 80).

The syllabi of the opinion of the Supreme Court of Nebraska (Transcript of Record, p. 83) shows that such contentions were continued and denied by the Supreme Court, and its motion for rehearing (Transcript of Record, pp. 91-92) shows such contetions were again insisted upon in seeking a rehearing.

In seeking to have the jury instructed to return a verdict in its favor, both in Instruction No. 1 requested by plaintiff in error, and in motion for instructed verdict at the close of the testimony, the plaintiff in error claimed immunity from liability under the Federal law —the law on which the cause of action was based. Its claims were denied and in denying same the Supreme Court of Nebraska deprived plaintiff in error of a right and immunity claimed under the Federal law, and its acts in doing so are reviewable on this writ of error.

A very similar case was St. L. I. M. S. Ry. vs. McWhirter, 229 U. S. 265-277. The petition based the action upon the Federal Act. At the close of the testimony a motion for instructed verdict was made by the defendant and overruled, and judgment entered against it. This judgment was upheld by the Supreme Court

of the state and the case was brought to this court on writ of error, where it was claimed no privilege or immunity was denied defendant. This court overruled such contention and assumed jurisdiction of the case, and said:

> "It is true that, although the case was exclusively rested upon the Federal statutes, as it comes here from a state court, our power to review is controlled by Rev. Stat. 709, and we may therefore not consider merely incidental questions not Federal in character, that is, which do not in their essence involve the existence of the right in the plaintiff to recover under the Federal statute to which his recourse by the pleadings was exclusively confined or the converse, that is to say, the right of the defendant to be shielded from responsibility under that statute because, when properly applied, no liability on his part from the statute would result. * * * And, of course, as the cause of action alleged was exclusively placed on the Federal statute, and the defense therefore alone involved determining whether there was liability under the statute, the mere statement of the case involved the Federal right and necessarily required, from a general point of view, its determination. * * * While it is true, as we have said, that, coming from a state court, the power to review is controlled by Rev. Stat. 709, yet where in a controversy of a purely Federal character, the claim is made and denied that there was no evidence tending to show liability under the Federal law, such ruling when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law."

In the case at bar the action is based exclusively upon the Federal law, and plaintiff in error claims the

right "to be shielded from responsibility under that statute because when properly applied no liability on his part from the statute would result." If that statute is properly applied with respect to the alleged negligence of plaintiff in error and with respect to the alleged assumption of risk of defendant in error, as we contend, no liability will exist, and in asserting no liability for said reasons plaintiff in error asserted a right, privilege and immunity under such act.

4. The fact that a proper instruction on assumption of risk may have been given will not save the judgment in this case, for an improper instruction on such subject was also given. The instructions were contradictory, and one may not know which instruction the jury followed.

The instructions given to the jury on the question of assumption of risk are Instruction No. 5 given by the court on its own motion, Instruction No. 3 given on request of defendant in error, and Instruction No. 5 given on request of plaintiff in error. These instructions are set out in the order suggested on pages 7 and 8 of brief of defendant in error. Instruction No. 5 given by the court on its own motion, as well as Instruction No. 5 given on request of plaintiff in error, are substantially correct statements of the law and direct the jury that even if plaintiff in error was negligent in furnishing the lubricator glass complained of, defendant in error would assume the risk if the danger in using same was obvious or if he knew or in the exercise of reasonable care ought to have known of the danger thereof. Instruction No. 3, however,

given on request of the defendant in error, told the jury that if plaintiff in error was negligent in furnishing the lubricator glass, then defendant in error would not assume the risk. The jury was further told that an employe does not assume any risks of injury growing out of negligence of the master. The error and vice of this instruction is emphasized by Instruction No. 4, given to the jury on the court's own motion (Transcript of Record, p. 12). The instruction is complete in itself, sets out claim of defendant in error as to alleged negligence, and the jury advised as follows:

> "If you believe from a preponderance of the evidence that defendant was so negligent and careless as aforesaid, and that the plaintiff was injured as a result of defendant's said carelessness and negligence, and without any fault or negligence on his part, then you should find for the plaintiff, otherwise for the defendant."

No mention is made in the instruction of the doctrine of assumption of risk, and same is entirely ignored. This instruction is in harmony with Instruction No. 3 requested by defendant in error and contradictory of Instructions No. 5 given by the court on its own motion and on request of plaintiff in error. It is true this instruction so far as contributory negligence is concerned is too favorable to plaintiff in error; at least such would be the case if there was substantial evidence of negligence on the part of defendant in error which contributed to the injury. With the instructions on assumption of risks in such condition defendant in error is not in a position to assert that plaintiff in error was not prejudiced by Instruction No. 3 given on his request.

Defendant in error closes his brief with the suggestion that plaintiff in error tried the case on the theory that it should have been submitted under the state law. In this he is not supported by the record. Plaintiff in error made no such contention. It did contend that the evidence was insufficient to show defendant in error was employed in interstate commerce at the time of being injured, but the theory of plaintiff in error was that failure to show a cause of action under the Federal Act would require a dismissal of the case, not a submission under a law different from that upon which a liability was asserted. Such was the understanding plaintiff in error had of the opinion of this court in Railway vs. Seale, 229 U. S. 156-159. On the theory of plaintiff in error all through the Trial and Supreme Courts the case must stand or fall on the Federal Act. Therefore the right and immunity of defendant denied by entering a judgment against it was a right and immunity claimed under the Federal Act.

Such other questions as are suggested by the brief of defendant in error are sufficiently covered by our original brief, and we therefore do not notice them in this reply.

We respectfully renew our request that this case be reversed.

Respectfully submitted,

WILLIAM G. WHEELER,
WYMER DRESSLER,
A. A. MCLAUGHLIN,
Solicitors and Counsel of Plaintiff in Error.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

NO. 726

CHICAGO & NORTH WESTERN RAILWAY COMPANY, Plaintiff in Error,

VS.

WILLIAM BOWER, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF DEFENDANT IN ERROR.

I.

Statement of the Case.

The defendant in error, William Bower, brought this action to the District Court of Holt County, Nebraska, to recover damages from the defendant for the loss of an eye which was caused by the breaking of a Nathan lubricator glass on an engine owned and operated by the defendant and of which defendant in error was the locomotive engineer. It is stated in

the brief of plaintiff in error that "the right to recover is based upon Federal Employers Liability Act." This is not either a full or accurate statement of the case. No doubt, the plaintiff in error would be very glad now to have the court assume that both sides conceded the action was under the Federal Employers Liability Act for it certainly realizes that in the trial of this cause in the trial court the plaintiff in error claimed no benefit of any federal law; it claimed no federal protection; it denied federal authority; it claimed that the action was to be determined solely by the law of Nebraska. And, with this in mind, it is well to remember what the allegations of the petition stating the cause of action of defendant in error were.

In Nebraska, we have the Code pleading. The plaintiff is not required to separately state and number causes of action arising out of the same transaction. All he is required to do is to make a concise statement of the facts. Accordingly, in the petition in this case, the defendant in error alleged that he was engaged in interstate commerce as an employe of plaintiff in error. It also alleges that he was engaged in interstate commerce as an employe of plaintiff in error. The allegation in this respect is as follows:

"This plaintiff was engaged as a railway employe of the defendant operating its engine and aiding and assisting the defendant in the transportation of persons, and property as a common carrier within the state of Nebraska, and during all of said time, the defendant was engaged as a common carrier for hire within the state of Nebraska."

The petition in this case stated a cause of action under three different laws: (1) It stated a cause of action under the National Employers Liability Law. (2) It stated a cause of action under the Railway Employes Statute of Nebraska. (3) It stated a cause of action at common law.

As we shall point out hereafter, the plaintiff in error insisted in the trial court and in the Supreme Court of Nebraska that this case did not come under the Federal Employers Liability Law. It was insisted that it came under the State Laws of Nebraska and that alone. It claimed no protection of the Federal Law. The protection of the Federal Law is a last resort in this court after they had been defeated elsewhere.

II.

The Railway Company, the plaintiff in error herein, was using at the time that Mr. Bower lost his eye two kinds of lubricators through which the oil passed. It had used from 1886 until 1906 what is known as the Nathan Lubricator and which is the lubricator involved in this action. It is simply a round glass tube and the oil passed through it. Around this tube was a metallic shield with small openings in it so the engineer could see when the oil was running. In 1906, it began to put on what is known as Bull's Eye Lubricator, which consisted of a thick, flat piece of glass. They came into use first on the high pressure engines such as the one which Bower was using when injured. But the engine on which he was working was equipped with the old

style Nathan Lubricator. The evidence of the Railway Company's foreman from Chicago showed that three-fourths of all the engines, both high pressure and low pressure, big and little, were equipped with the Bull's Eye Lubricator. He frankly testified that the others were dangerous and broke and hurt the men and that the change was made from the old constantly breaking, exploding, dangerous, fossilized Nathan Lubricator to the more modern and absolutely safe Bull's Eye Lubricator. That this was the situation I cannot put to you more clearly than to quote from the opinion of the Supreme Court of Nebraska as follows:

"This testimony by defendant's foreman established several important facts. It shows that the Bull's Eye is now recognized by the defendant as the proper appliance and has been for three or four years; that all of the engines of the class plaintiff was operating, engines of 190 pounds pressure, now come equipped with the Bull's Eye; that since the Bull's Eye made its appearance defendant has been changing this device on its engines by substituting the Bull's Eye for the old Nathan and had made such substitution on about 75 per cent of all of its engines, "big and little and all." A fair inference is that in making those changes they would devote their attention more particularly to the high pressure engines, and if only 25 per cent of all of their engines " big and little and all" now have the old Nathan it is, we say, a fair inference that by far the larger portion of that 25 per cent would be low pressure engines. It also discloses an important fact not known to plaintiff when he said that he did not know of anyone connected with the defendant who would know more about the danger incident to the use of the old style Nathan than himself. It shows that the company knew that the old Nathan would explode

and "hurt men." When the witness testifies that these old lubricators had been known to explode and was asked: "Q. And hurt men?" he answered "Sure." There is significance in the emphatic character of this answer. He further shows that that fact was one of their reasons for changing from the old Nathan to the Bull's Eye lubricator; that other fact being that the breaking of the lubricators would delay the trains at times. It therefore appears that the defendant knew the old style lubricator, which it had been using for many years, was dangerous; that its employes who were using it were being injured by it; that there was another device in the market, which the defendant was using, that was absolutely safe, and yet it continued to permit plaintiff and other engineers in its service to use the dangerous device when it knew of and had in its possession a safe one, which could easily and cheaply be substituted. This does not come within the rule that a master is not obliged to use the best known device. It presents the simple question whether a master may continue to use a dangerous appliance when it knows of and has at its command a perfectly safe one. This it cannot do. We therefore hold that the court did not err in submitting the question of defendant's negligence to the jury."

III.

Practically, the sole ground relied upon for reversal here is the giving of one of the several instructions given by the court on the question of assumed risk. And while we shall insist before the close of this brief that the railway company is not in a position to have this case reviewed for the good and sufficient reason that it invoked no protection of Federal Law in the trial court, still we wish to point out to the court that the instructions of the court are

absolutely sound and entirely free from even the slightest criticism.

In Nebraska, the law required the court to instruct the jury on all the material issues in the case upon the court's own motion. The Court also is required to supplement these instructions with others given at the request of the litigants, provided the instructions so requested be proper. The uniform practice in the state is for the court to submit the case on its own instructions and then if there be some view that either side desires presented, the court will give instructions presenting that view, provided the same do not conflict with the court's instructions, and then these instructions taken as a whole constitute the instructions in the case and are taken by the jury to the jury room. In Nebraska, all instructions are in writing. The instructions which went with the jury to the jury room in this case are not referred to by counsel for the Railway Company. They take out one part of an entire charge on the question of assumed risk. We think it will be found that the one even attacked is perfectly sound, but in order that this court may understand how the question of assumed risk was submitted to the jury, it is necessary to put right together all the instructions given by the Court on the question of assumed risk. The instructions which cover this case given in their proper order and are customarily given in Nebraska are covered by the folowing instructions, to-wit:

Instruction No. 5 given by the Court on its own motion.

Instruction No. 3 given at the request of plaintiff.

Instruction No. 5 given at the request of the defendant.

These instructions, given in their proper order, are in the following language:

"The defendant further alleges in this case that, the injuries which the plaintiff received arose from and were due to the dangers and risks which were open and obvious and known to plaintiff and were assumed by him. And on this question you are instructed that, if the machinery, tools or appliances furnished a servant by his master are obviously defective and dangerous and the servant notwithstanding, continues in the service, he thereby assumes the risk of any injuries which he may sustain by reason of such defective appliance. And in this case, if you believe that the plaintiff knew of the weak, defective or insufficient condition of the glass in the said lubricator and understood that the same was unsafe and dangerous, and with this knowledge continued to operate the engine for the defendant, then he would not be entitled to recover in his case."

"The rule of law is that employees assume only the ordinary risks of the employment. Where the employer has furnished safe appliances and machinery, then the employee is held to assume the ordinary risks of injury from such appliances and machinery. But the employee is not held to assume the result of any injury sustained by reason of the negligence of the employer in furnishing and maintaining of safe appliances or machinery. So, in this case, if the jury shall find that the glass in the lubricator in question was a safe appliance furnished by the defendant Company, and if, notwithstanding the exercise of proper care by the Company in furnishing a safe glass in the lubricator, these injuries happened to the plaintiff, he cannot recover. But, on the other hand, if the jury shall be convinced

by preponderance of the evidence that the glass which broke in the lubricator was unsafe and dangerous and was too weak to withstand the pressure which the defendant might know it woudl have to withstand and it was liable to explode at any time, and if the jury shall find that the defendant negligently failed to furnish a safe glass in the lubricator, and that it carelessly and negligently placed upon said engine a glass in the lubricator which was insufficient and dangerous and was liable to explode, and that as without fault or negligence on his part, then the plaintiff will not be held to have assumed the risk of such injuries. Whether the defendant failed to furnish a safe appliance in the way of glass in the lubricator and whether it was guilty of neglect, and whether the plaintiff was guilty of neglect are questions for the jury; and it is also for the jury to detremine whether the injuries sustained were the result of the ordinary risks of the employment, or whether they were due to the neglect of the defendant, as herein defined.

"You are instructed that if you find from the evidence that the plaintiff in this case prior to his injury had the same knowledge as to the danger, if any, of the lubricator glass bursting, that the defendant had, and plaintiff continued in the employ of the defendant company and in the use of said lubricator glass, he assumed the risk of injury from the bursting of said glass and cannot recover in this action and your verdict must be for the defendant."

IV.

Doctrine of Assumed Risk .

The Act of Congress approved April 22, 1908, makes Railroad Companies liable to their employes

for any "injuries or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, tracks, roadbed, works, boats, wharves, or other equipment."

Section 5 of the Act further provides that "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be viod."

Under this Act, a Railroad Company cannot make even a written contract to exempt itself from liability for its own negligence. Congress has expressly prohibited any such agreement. The court was eminently right in declaring in one part of its charge that the employe does not assume the risk arising from the employer's negligence. The Court was plainly following the direction of Congress. The master is responsible for his own negligence . The employe is not responsible for the master's negligence. If the employe is to be held responsible for the master's negligence absolutely, then this Act of Congress is waste paper. But there are conditions under which an employe cannot recover notwithstanding the mastr's negligence. To begin with, the master is responsible for his own negligence and the employe does not assume the responsibility therefor. That is the general proposition correctly stated. But certain conditions may arise wherein the employe will waive his right of recovery notwithstanding the master's negligence. It is the duty of the Court to state all these phases of the law to the jury, notwith-

standing the master's negligence. Still if the risk be obviously or imminently dangerous so that no prudent man would remain in the Company's service, then the employe assumes the risk of any injury occasioned to him while remaining in such service. And even if the risk is not obviously or imminently dangerous, yet if it be dangerous in character and if the employe understands and appreciates the danger, he will assume the risk of injury from such dangerous appliance or condition. The general rule then is that the employe does not assume the risk of injury from the master's negligence. The master stands responsible for his own negligence. But notwithstanding the master's negligence, there may be conditions—exceptions to the general rule—where the employe will be held to have assumed the risk of injury. That is the rule recognized by this Court in its first opinion in the case of

Seaboard Air Line Ry. vs. Horton, 233 U. S. 492.

In this first opinion, the Court stated the law as follows:

"Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an

ordinarily prudent person under the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions in this court."

We are quite content with the statement of the rule of law in this Horton case. It is in absolute harmony with the instructions given by the trial judge in this case. It is the doctrine approved by the Supreme Court of Nebraska in this Bower case and in many former cases. The evidence in this case shows that Mr. Bower began to use the Nathan lubricators in 1886. He was an unusually careful engineer. In his twenty-five years service, there was never a black mark against him. He used this Nathan lubricator for seventeen years before even one broke on an engine that he was using. The dullest mind can understand that the risk of injury in this case was not obvious or imminent. Indeed, with a careful man like Bower, there would be less danger of injury than with men who were less careful. Then seven years more elapsed before one broke. That was about three weeks before the injury. It caused some delay and he asked his superior officer to get him one of the modern Bull's Eye Lubricators. Bower did not think there was danger in using the Nathan, but a breaking caused delay in the movement of the engine and Bower was an engineer hauling one of the Railway Company's fast passenger trains. It was the fast train from Chicago to the Black Hills in South Dakota, and a delay of eight or ten or fifteen minutes caused by the breaking of the glass was something that the engineer naturally desired to avoid. And so did the Company. It is undisputed that the Company promised three weeks before he was injured to put

in the Bull's Eye Lubricator. Bower did not demand this because he thought there was danger of being injured, but he wanted it so that there might be no delay with his passenger train. He had never been injured in the twenty-four years that he had used this Nathan Lubricator. He had never heard of any other employe being injured. On the two occasions when the glass broke with him, the shield kept it from injuring him and he had an absolute right to believe that the shield would protect him in the future. It was Jefferson who said that he knew of no way to judge the future execpt by the past. Bower had a right to judge the future by the past. In twenty-four years, only two of these lubricators had broken with him and the shield had protected him from injury. It is true that on other engines and with other engineers these glasses had broken frequently and had injured many employes and this was one of the controlling things that caused the Company to abandon the use of the Nathan Lubricator and adopt the inexpensive and safe Bull's Eye Lubricator. It is an absolutely fair inference from all this evidence that practically all of the high pressure engines had the Bull's Eye lubricator on them at the time Bower was injured. His engine was a high pressure engine, but it was left with a Nathan lubricator on it, although the Company well knew that these lubricators had frequently exploded. This new lubricator had been in use even on the North Western Railway Company for four years. It was not a case of the newest appliances. It was a simple, cheap and absolutely safe device. And as the Supreme Court of Nebraska well said, the company, which had a much greater knowledge of the danger of the Nathan lubricators than Bower had, continued

to use this dangerous lubricator on a high pressure engine when it had at hand a cheap, simple, plain and absolutely safe lubricator that it could use and which was in common use and which it was itself then using on practically all of its high pressure engines.

V.

No Federal Question Involved.

In the Supreme Court of Nebraska the railroad company contended that this action was not covered by National law. The evidence showed without dispute that defendant in error was the engineer who was to run the locomotive hauling a passenger train from Long Pine, Nebraska to Chadron, Nebraska. This made him prima facie an employee engaged in intrastate commerce and not in interstate commerce. This evidence went to the jury with all the other evidence and it was the contention of the railway company that the evidence showed Bower was employed only in intrastate commerce. They invoked the laws of Nebraska. The brief in the Supreme Court of Nebraska challenged the proposition that the case was to be determined by Federal law. The company contended that the trial court erred in submitting the case under Federal law for the reason that there was no evidence to show that Bower was engaged in interstate commerce when injured. We proved that this train was a train that was to be run through to the Black Hills. We contended that the Court was required to take judicial notice of the fact that the Black Hills were in South Dakota and hence that this was an interstate train. The railway company vigorously disputed this claim and asserted

with great positiveness that the nationl law had nothing to do with this case and that it should be submitted under the laws of Nebraska and that the trial Court erred in submitting it under the national law. The Supreme Court of Nebraska in its opinion holds that the Court had a right to take judicial notice of the fact that the Black Hills were in South Dakota and that while there was evidence tending to show that he was engaged in intrastate commerce in Nebraska yet there was this additional evidence which brought the case under Federal law.

Here is the situation then: In the Trial Court the company denied that this case came under the Federal law. It contended that we had not made out a case under the Federal law. It contended in its motion for a new trial that the Court erred in submitting this case under Federal law. In the Supreme Court of Nebraska it contended that the evidence showed Bower to be engaged in intrastate commerce and that there was no evidence that he was engaged in interstate commerce. It denied Federal authority. In this Court the railway company for the first time invokes the protection of the national law. We submit that the claim now comes too late, under the following adjudications:

Carothers vs. Mayer, 164 U. S. 325.

Gordon vs. Caldcleugh, 3 Cranch. 268.

Scott vs. Jones, 5 Howard 343.

Linton vs. Stanton, 12 Howard 423.

Strader vs. Baldwin, 9 Howard 261.

Calcote vs. Stanton, 18 Howard 243.

Ryan vs. Thomas, 4 Walace 603.

Missouri vs. Andriano, 138 U. S. 496.

DeLamar Nevada Gold Min. Co. vs. Nesbit, 177 U. S. 523.

Sayward vs. Denny, 158 U. S. 180.

Jersey City & B. R. Co. vs. Morgan, 160 U .S. 288.

Rae vs. Homestead Loan & Guaranty Co., 176 U. S. 121.

Abbott vs. Tacoma Bank of Commerce, 175 U. S. 409.

Harding vs. Illinois, 196 U. S. 78.

Waters-Pierce Oil Co., vs. Texas, 212 U. S. 86.

Seaboard A. L. Co. vs. Duvall, 225 U. S. 477.

Whitten vs. Tomlinson, 160 U. S. 231.

Penn. Mut. Life Ins. Co. vs. Austin, 168 U. S. 685.

Holden vs. Aultman, M. & Co., 169 U. S. 81.

Field vs. Barber Asphalt Co., 194 U. S. 618.

Montgomery vs. Hernandez, 12 Wheaton 129.

Hale vs. Gaines, 22 Howard 144.

Murdock vs. Memphis, 20 Wallace 590.

Counsel cite in favor of the right to riview this case

St. Louis, Iron Mountain & Southern Railway Co., vs. McWhirter, 229 U. S. 265.

That is a totally different case. In that case the petition put the cause of action exclusively under the Federal law. The petition in this case puts it under national law and state law, and indeed even the common law. There was evidence in the case to go to jury upon the theory that Bower was engaged in intrastate commerce and there was evidence which justified a finding against the company on that theory. There was some evidence tending to show that he was also engaged in interstate commerce and which justified the submission of the cause on that theory. This was an action in a code state where the plaintiff has to plead the facts merely and was entitled to recover if he made out a case under the state law or the common law. In this respect then it differs entirely from the McWhirter case just cited.

Counsel also cites

Toledo, St. Louis & Western Railroad Co. vs. Slavin, 236 U. S. 454.

But in that case the defendant contended that the right of recovery existed, if at all, under the Federal Act. It claimed the protection of the Federal Act in the trial Court. In this case the company claimed no protection under the Federal Act in the trial Court. It denied that the Federal

Act applied. It claimed in the Supreme Court of Nebraska that the only evidence making the company liable was evidence showing that Bower was engaged in intrastate commerce. It claimed no protection under Federal law. It denied that the Federal law had anything to do with the case. And the right of this Court to review this case at all depends upon whether the railway company claimed Federal protection in the trial Court. If it claimed no such protection there it never can assert the claim.

In this Court the company admits that there is sufficient evidence to bring the action under the Federal Employers Liability law. That being the case the trial Court was right in submitting it under that theory. The railway company was wrong in contending in the trial Court that the case should not be submitted under the Federal law. It so claimed by excepting to the instruction under which the trial court submitted it under the Federal law. This appears from the record in two respects. The record at page 8 shows an instruction by the Court submitting the question of liability under Federal law. It shows right at the bottom of the instruction that the defendant excepted thereto. Then in Subdivision 7 of the motion for a new trial the railway company again excepts to the action of the Court in submitting this case under Federal law. From the outset it has denied all Federal authority. It has claimed no Federal protection any where until it got into this Court. The claim of Federal protection therefore comes too late. It is certainly elementary that a litigant must claim the protection of Federal law in the trial court or he waives it forever.

VI.

Evidence of Negligence.

Plaintiff in error contends that the Nathan glass was made to withstand five hundred pounds pressure to the square inch. This is a mistake. They were made to stand the same pressure as would be on the boiler. Counsel refers to the record at page 73 and it is the only evidence on the question of five hundred ponuds, and here is the answer:

"Well our information is from the manufacturer, five hundred pounds to the square inch."

Then on cross-examination he was asked

"Q. Of course you have no personal knowledge whether that is true or not?

A. No sir."

When we consider the number of these glasses that broke from time to time it is quite plain that they would not stand the ordinary boiler pressure at all times. Frequently they failed to withstand it. It is suggested in argument that there was not sufficient evidence of the company's negligence and that the fact that this glass broke on this one occasion is not evidence of negligence. The Trial Court so instructed the jury. But that is not this case. These Nathan Lubricators have been breaking for twenty-five years. They caused such delays in running the trains; they injured so many men, that the company, four years before Bower was hurt began to replace them and had practically put Bull's Eye Lubricators

on all of its high pressure engines at the time Bower was hurt. Nobody has contended that they were required to use some new or untried device. But here the company had an opportunity to use two kinds of lubricators. Both lubricators were in general use for years. Both were inexpensive. Both were simple. One of them was dangerous. One of them would break and delay trains, which would inconvenience the public and might even lead to collisions and loss of life. The other was cheap, simple, plain and absolutely safe. Under such conditions a Court might well say as a matter of law that the company was negligent in failing to use the safe device. But that was not done here. The question of its negligence was fairly submitted to the jury and on instructions quite favorable to the railway company .

VII.

No Evidence to Sustain Assumed Risk.

In concluding this argument we wish to direct the attention of the Court to the fact that the Supreme Court of Nebraska passed on the question of assumed risk in two ways. First the Court said that on the facts in this case Bower did not assume the risk. In the second place the Court said that if the questiion of assumed risk was to be determined upon the evidence that the verdict was right and that the instructions were right and fairly submitted the case. We submit that there is no evidence here to justify the submission at all of the defense of assumed risk. Such a defense, it will be agreed on, is an affirmative one and must be plead affirmatively in

Nebraska and proved by the Company. The undisputed evidence is that Bower used these glasses for seventeen years without a break in one of them. Then he used them again for seven years more without a break. When they did break the shield acted as a complete protection. He did not think they were dangerous. He had never been hurt by one of them. He never heard that anybody was hurt by one of them. Under these conditions it is undisputed that the danger was not obvious or imminent. In the next place it is undisputed that Bower did not realize that they were dangerous and did not appreciate that there was any likelihood of his being injured by using the Nathan lubricator. The defendant having totally failed then to prove by any evidence either that the Nathan lubricator was obviously and imminently dangerous, or that it was under ordinary conditions somewhat dangerous and that Bower knew and appreciated the danger it has entirely failed to make out a case of assumed risk. It is utterly without a scintilla of evidence to sustain this defense. The Nebraska Supreme Court was right in saying that the case ought to be decided against it on two grounds: First, that there was no evidence to prove assumed risk. And in the second place that the doctrine of assumed risk as it existed at common law was properly given to the jury. The judgment in this case is just and ought to be affirmed.

And finally, the plaintiff in error having tried the case in the trial court on the theory that it must be submitted under the state law, and that the court erred in submitting it under the Federal law, and it not having claimed any protection of the Federal law,

in the trial court, and it having repudiated the Federal law in the trial Court, it is not now in shape to ask this Court to review this cause.

Respectfully submitted,

MICHAEL F. HARRINGTON,

Attorney for Defendant in Error.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY *v.* BOWER.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 301. Argued March 16, 17, 1916.—Decided June 5, 1916.

While the employer is under a duty to exercise ordinary care to supply machinery and appliances reasonably safe and suitable for the use of the employee, he is not required to furnish the latest, best, and safest, or to discard standard appliances upon the discovery of later improvements, provided those in use are reasonably safe and suitable.

Subject to this rule, the question whether the appliance which caused the injury in this case, and which was not of the latest type, was reasonably safe and suitable, was properly submitted to the jury.

Assumption by a locomotive engineer of the ordinary risk of using a lubricator glass when subjected to a normal bursting strain, does not import assumption of an increased and latent danger attributable to the employer's negligence in maintaining the appliance upon an engine carrying an undue pressure.

96 Nebraska, 419, affirmed.

THE facts, which involve the validity of a judgment for damages for personal injuries in an action under the Employers' Liability Act, are stated in the opinion.

Mr. A. A. McLaughlin with whom *Mr. William G. Wheeler*, and *Mr. Wymer Dressler* were on the brief, for plaintiff in error.

Mr. Michael F. Harrington for the defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

We have here under review a judgment of the Supreme Court of Nebraska affirming a judgment in favor of de-

fendant in error in an action based upon the Federal Employers' Liability Act of April 22, 1908 (c. 149, 35 Stat. 65), for the loss of an eye caused by the breaking of a lubricator glass on a locomotive engine upon which he was at work as engineer in the employ of plaintiff in error. 96 Nebraska, 419.

No question is made but that the cause of action arose in interstate commerce so as to bring the case within the Federal act. The facts upon which the question of liability depends are these: The plaintiff in the action (defendant in error) was an experienced locomotive engineer. At the time of his injury, which occurred at night in the month of November, 1910, he had just oiled his engine, taken it from the round-house, and placed it upon the outgoing track in readiness for his run. The engine was equipped with a Nathan lubricator, an appliance containing oil for the steam cylinders and the air pump, the oil being conducted to and within the parts where needed under steam pressure from the boiler. In order to give the engineer a view of the interior of the apparatus, and thus enable him to see that the oil was dropping, three cylindrical glass tubes were attached, one carrying the oil for each steam cylinder and one for the air pump. Each of these glasses was surrounded with a shield of perforated metal in two parts hinged together and lightly clamped upon the glass tube by means of a spring to hold it in place. When the lubricator was in operation, the tubes were required to sustain the same steam pressure as the boiler. These tubular glasses would sometimes break. This was most liable to occur: (1) when a glass was newly installed and before it had been properly tempered; (2) when it was subjected to a sudden change of temperature, as when steam was admitted to it while cold; and (3) they would after six or seven weeks' use sometimes "wear thin" and break for this reason. The metal shield was designed in part at least to prevent injury to the

engineer from flying pieces in case the glass should break. This type of lubricator had been in use for over twenty years and had been used upon all defendant's engines down to a time between three and four years prior to the accident. Then a new type known as the Bull's Eye came into use and was recognized as a better appliance because, being unbreakable, it was safer for the engineer, and at the same time obviated the loss of time and delay of trains attributable to breakage of lubricators of the Nathan type; and defendant began to instal Bull's Eye lubricators in place of the older type upon engines already in use and to place them upon all new engines. During the earlier period of the use of the Nathan and before the construction of locomotives of classes Q and R, the engines carried only 140 to 150 pounds boiler pressure, while engines of the classes mentioned carried 190 pounds. An experienced witness called by defendant testified that at the time of the trial (about a year after the accident), approximately 25 per cent. of the engines were still using the Nathan lubricator and 75 per cent. were equipped with the Bull's Eye; that the Bull's Eye was and had been for three or four years recognized as "the proper appliance"; that the Nathan was dangerous to the men, and that the change was being made partly because of this and partly because the breaking of the old style lubricator sometimes delayed trains.

Plaintiff testified that during most of the time for the past 20 years he had operated locomotives equipped with Nathan lubricators having tubular glasses, but not all of these were high-pressure engines. The engine on which he was injured was of Class R, and carried a boiler pressure of 190 pounds. He had operated it for about two months prior to the time of his injury. During his experience of 20 years, lubricator glasses had broken with him on three previous occasions, the last being about three weeks before the occurrence in question. At this

time he asked that a Bull's Eye be substituted on his engine. He testified that this was not because he considered the old lubricator dangerous, but because he wanted to save time on the road in the event of a breakdown. He also testified that he knew that when a new glass was put into a Nathan lubricator it was liable to burst if the steam was turned on suddenly, or if steam was turned on quickly in cold weather, and that on the occasion in question, following the correct practice, he first partially opened the throttles, admitting the steam to the tubes to warm them, afterwards fully opening the throttles, and that it was about seven minutes after this was done that the explosion occurred.

The trial court submitted the case to the jury with instructions to the effect that the burden of proof was upon plaintiff to show that defendant had carelessly and negligently maintained the shield and spring and glass in the lubricator in a weak and dangerous condition, that the lubricator glass was not of sufficient strength for use upon the engine in question or any other engine carrying 190 pounds of steam, and that this fact was known to defendant, or that its experience with said glass and lubricator had been such that it ought to have known that the same was insufficient and dangerous; and that if they believed from a preponderance of the evidence that defendant was thus negligent, and that plaintiff was injured as a result of it, they should find for the plaintiff, otherwise for the defendant.

The principal controversy is as to whether the evidence was sufficient to go to the jury upon the question of defendant's negligence in furnishing the locomotive in question with a lubricator having tubular glasses as described.

The rule of law is: That the employer is under a duty to exercise ordinary care to supply machinery and appliances reasonably safe and suitable for the use of the em-

ployee, but is not required to furnish the latest, best, and safest appliances, or to discard standard appliances upon the discovery of later improvements, provided those in use are reasonably safe and suitable. *Washington &c. R. R.* v. *McDade*, 135 U. S. 554, 570; *Patton* v. *Tex. & Pac. Ry.*, 179 U. S. 658, 664. In our opinion, a correct application of this rule required the present case to be submitted to the jury. Properly limiting the inquiry (and, as we have seen, the trial court did so limit it,) there was no question of attributing negligence to an employer for merely failing to promptly instal the latest, best, and safest appliance; it was a question of keeping an older type of appliance in use after its insufficiency had been demonstrated by experience, and perhaps under conditions materially different from those which had obtained when its use began, in the face of notice that it was not reasonably safe and suitable. It was reasonably inferable from the evidence that defendant's experience had shown that a glass tube capable of withstanding the lower pressures of 140 to 150 pounds could not be relied upon to withstand a pressure of 190 pounds, and that the difficulty could not be obviated, as was attempted, by using thicker glass for the tubes, because its very thickness increased the danger of bursting when steam was first admitted; there being evidence from a witness called by defendant that the older type of lubricator was a dangerous instrument to be used upon a high-pressure boiler and that they broke rather frequently; that it was for this reason, in part, that defendant had introduced the Bull's Eye, beginning three or four years before the accident, installing them first upon high-pressure engines of the Q and R classes, and having already placed them upon a majority of defendant's engines of all sizes. In this state of the evidence it could not be said, as matter of law, that defendant was free from negligence in delaying so long to instal a Bull's Eye lubricator upon the engine in question.

The only other question relates to whether plaintiff assumed the risk of performing his duty upon a locomotive equipped with the Nathan lubricator. Instructions were given to the jury upon the subject, but they are open to some criticism which perhaps can be obviated only by holding, as the Supreme Court of Nebraska held, that there was nothing in the evidence that would sustain a finding that plaintiff assumed the risk.

The crucial question is whether he knew or had sufficient notice of the increased danger attributable to the employer's negligence. Plaintiff testified without contradiction that it was his understanding—he had been "always taught to believe"—that the Nathan lubricator would stand the boiler pressure of 190 pounds. Assuming, as the undisputed evidence shows he had a right to assume, that the glass was being subjected to no greater bursting strain than it was designed to withstand, he still knew that, under special circumstances that have been pointed out, there was danger of a glass bursting unless precautions were taken. Any risk of this character, unaffected by his employer's negligence, he undoubtedly assumed, as a risk ordinarily incident to the occupation he pursued. But this throws no light upon his right to recover, because if he was subjected to no greater risk than that just now indicated, the employer was not negligent and there was no ground of recovery. Under the trial court's instructions, the jury must be presumed to have found that the Nathan lubricator glasses had been shown by experience to be incapable of withstanding a pressure of 190 pounds, that defendant knew of this, and nevertheless negligently maintained such glasses upon plaintiff's engine. There was present, therefore, an extraordinary danger, not normally incident to plaintiff's employment; it was in its nature latent, and not obvious; and there is no evidence in the record that plaintiff had received any notice or warning of the increased hazard attributable to his employer's

negligence. In short, while he knew there were certain dangers naturally incident to the use of tubular glasses upon the lubricator, there is nothing to show that he knew or had any ground to believe that his employer had been wanting in the exercise of proper care for his safety, or that because of such want of care the danger to him was greater than it ought to have been. Without this, he could not be held to have assumed the increased risk. *Gila Valley Ry.* v. *Hall*, 232 U. S. 94, 101; *Seaboard Air Line* v. *Horton*, 233 U. S. 492, 504.

Judgment affirmed.